

No. 83-18-CSX  
Status: GRANTED

Title: Dun & Bradstreet, Inc., Petitioner  
v.  
Greenmoss Builders, Inc.

Docketed:  
July 8, 1983

Court: Supreme of Vermont

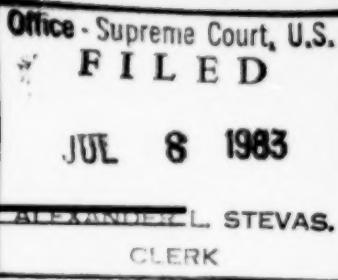
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Entry	Date	Note	Proceedings and Orders
1	Jul 8 1983	G	Petition for writ of certiorari filed.
2	Aug 10 1983		DISTRIBUTED. September 26, 1983
3	Aug 11 1983	X	Brief of respondent Greenmoss Builders, Inc. in opposition filed.
4	Aug 15 1983		Respondent's letter noting compliance with Rule 28.1 filed.
6	Oct 3 1983		REDISTRIBUTED. October 7, 1983
8	Oct 11 1983		REDISTRIPUTED. October 14, 1983
11	Oct 19 1983		REDISTRIBUTED. October 23, 1983.
13	Oct 31 1983		REDISTRIBUTED. November 4, 1983
14	Nov 7 1983		Petition GRANTED.
15	Dec 22 1983		*****
16	Dec 22 1983		Brief of petitioner Dun & Bradstreet, Inc. filed.
17	Dec 22 1983		Joint appendix filed.
18	Jan 5 1984		Brief amicus curiae of The Washinton Post filed.
19	Jan 5 1984		Record filed.
21	Jan 11 1984		Certified original records, 1 box, received.
			Order extending time to file brief of respondent on the merits until January 30, 1984.
23	Jan 23 1984		Brief amicus curiae of Sunward Corporation filed.
24	Jan 30 1984		Brief of respondent Greenmoss Builders, Inc. filed.
25	Feb 14 1984		SET FOR ARGUMENT. Wednesday, March 21, 1984. (4th case)
26	Feb 15 1984		CIRCULATED.
27	Mar 6 1984	D	Motion of respondent for leave to file supplemental brief filed.
28	Mar 7 1984	X	Reply brief of petitioner Dun & Bradstreet, Inc. filed.
29	Mar 9 1984		DISTRIBUTED. March 16, 1984. (Motion of respcnd. for leave to file supplemental brief).
30	Mar 19 1984		Motion of respondent for leave to file supplemental brief DENIED.
31	Mar 21 1984		ARGUED.

83-18

No.



IN THE  
**SUPREME COURT OF THE UNITED STATES**  
**OCTOBER TERM, 1983**

DUN & BRADSTREET, INC.,  
*Petitioner,*

v.

GREENMOSS BUILDERS, INC.,  
*Respondent.*

On Petition for a Writ of Certiorari to the  
Supreme Court of the State of Vermont

**PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF THE STATE  
OF VERMONT**

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**QUESTIONS PRESENTED FOR REVIEW**

The issue presented in this case is whether the First Amendment's limitations on the award of presumed and punitive damages for libel, first enunciated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), apply to "non-media" defendants. The questions presented for review are:

- I. Do the First and Fourteenth Amendments to the Constitution permit private plaintiffs to recover presumed compensatory damages or "general" damages for libel against a "non-media" defendant?
- II. Do the First and Fourteenth Amendments to the Constitution permit private plaintiffs to recover punitive damages for libel against "non-media" defendants under a standard of liability less demanding than the "actual malice" standard of *New York Times v. Sullivan*?
- III. Did the trial court's instructions on presumed and punitive damages in this libel action violate the First and Fourteenth Amendments?

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## OPINIONS BELOW

The order and opinion of the Supreme Court of the State of Vermont is not yet reported. It is reprinted in the Appendix at A1-A16.

The order of the Superior Court of Washington County, Vermont granting Dun & Bradstreet, Inc.'s motion for new trial is unreported. It is reprinted in the Appendix at B1-B3.

## GROUNDS ON WHICH THIS COURT'S JURISDICTION IS INVOKED

Petitioner seeks issuance of a writ of certiorari to review an order and opinion of the Supreme Court of the State of Vermont dated and entered April 15, 1983. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1257(3).

## CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. I, which provides in pertinent part:

"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

U.S. Const. amend. XIV, § 1, cl. 2:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

This is a libel action brought by Greenmoss Builders, Inc. ("Greenmoss") against Dun & Bradstreet, Inc. ("D&B")<sup>1</sup> petitioner herein, a publisher of financial reports.<sup>2</sup> The action was brought in the state courts of Vermont and was tried before a jury. The jury returned a verdict for Greenmoss in the amount of \$50,000.00 compensatory damages and \$300,000.00 punitive damages.

### 1. The Facts

D&B publishes financial and related information concerning businesses to its subscribers. As part of a continuous service, D&B publishes "Special Notices" to subscribers interested in a particular business. On July 26, 1976, D&B reported in a Special Notice to five of its subscribers that Greenmoss had filed a voluntary petition in bankruptcy.<sup>3</sup>

<sup>1</sup> Dun & Bradstreet, Inc. is a wholly owned subsidiary of the Dun & Bradstreet Corporation. The non-wholly owned subsidiaries of the Dun & Bradstreet Corporation are Donnelley & Gerrardi Verwaltungs-GmbH., Donnelley & Gerrardi GmbH. & Co. K.G., Dun & Bradstreet S.L., and Dun & Bradstreet A.G. Affiliates of Dun & Bradstreet International, Ltd., a wholly owned subsidiary of Dun & Bradstreet Corporation, are: Thomson Directories Ltd., Thomson Directories, Thomson Sales & Services Ltd., DBH Wirtschaftsdatenbank GmbH., Dun & Bradstreet (HK) Limited, and Telemarketing Italia S.p.A.

<sup>2</sup> D&B publishes financial and other information concerning businesses. It is not a consumer reporting agency.

<sup>3</sup> If a D&B subscriber has received information on a particular business within twelve months of the issuance of a Special Notice, that subscriber will automatically receive the Special Notice. Here, the Special Notice concerning Greenmoss was sent to the Howard Bank, American Express Company, State Mutual Insur-

On August 3, 1976, eight days after the publication of the Special Notice, Greenmoss' president contacted D&B's regional office in Manchester, New Hampshire and advised D&B that the Special Notice was in error. On that same day, a retraction in the form of a "Correction Notice" was issued explaining the error and advising that the bankruptcy petition had been filed by an employee of Greenmoss, and not Greenmoss itself. This Correction Notice was sent to each of the five subscribers who had received the original Special Notice.

### 2. The Proceedings Below

At trial, Greenmoss claimed that it was libeled by the publication of the Special Notice. Greenmoss did not offer testimony from *any* of the five subscribers or any other disinterested person to prove that the publication of the Special Notice caused damage. The company's sole evidence on damages was the testimony of its own former president, who had a pecuniary interest in the outcome of the case. He speculated that although the company's profits had increased after the Special Notice, they had fallen short of expectations. He also estimated that the company had incurred expenses of \$2,000 - \$5,000 to contact individuals to refute the erroneous information.

Greenmoss contended that the Special Notice had prompted one of the five subscribers, a bank, to terminate its lending relationship with the company. But a representative of the bank, called by D&B, testified that the bank's decision was not made on account of

ance Company, Goodyear Tire and Rubber Company, and Aetna Insurance Company.

the Special Notice but for other reasons by two bank officers who had no knowledge of it.

The trial court instructed the jury that this was an action for libel *per se* and that damages, therefore, were presumed:

Words which tend to injure the Plaintiff in its occupation, or proof such as words which tend to impute the insolvency of a business, are libelous *per se*. This means that the Plaintiff *does not need to prove actual damages resulting from the libel since damage and loss is conclusively presumed*. (emphasis added).

Later, the Court added:

Now if you determine that the Defendant is not entitled to the benefits of a qualified privilege, you must then consider the question of damages; where, as in this case there is a libel *per se*, *damages are presumed and actual damages may not be proven*, you must determine the amount of compensatory damages to be awarded. In determining the amount of compensatory damages to award, you may consider such items as lost profits and expenditures proximately caused by any wrong doing on the part of the Defendant. Although *the law presumes damages in some amount in a case of libel per se and therefore relieves the Plaintiff of the burden of establishing by specific proof that damages have occurred*, the law does not compel you to return a verdict of substantial damages unless you are persuaded by a preponderance of the evidence that substantial damages have in fact occurred. It is proper, if, in your judgment you deem it to be correct, even in a case of libel *per se*, for you

to return a verdict of nominal damages such as One Dollar, or damages in such other amount as you feel is fair and just compensation to the Plaintiff for the damages actually caused by the Defendant. (emphasis added).

Thus, the trial court's instructions on libel *per se* permitted an award of presumed damages and relieved Greenmoss of the necessity of proving damages by specific proof.

The trial court also instructed the jury that it could award punitive or exemplary damages upon a finding that D&B acted with "actual malice." The court did not define "actual malice." It defined "malice" as follows:

If you find that the Defendant acted in a bad faith towards the Plaintiff in publishing the Erroneous Report, or that Defendant intended to injure the Plaintiff in its business, or that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously . . . (emphasis added).

D&B timely objected to the portions of the court's instructions on libel *per se* and punitive damages.

Following the trial court's instructions on presumed and punitive damages, the jury returned a verdict for Greenmoss in the amount of \$350,000.00, consisting of \$50,000.00 compensatory damages and \$300,000.00 punitive damages. The \$50,000 "compensatory" damage award exceeded Greenmoss' own evidence of actual damages. Greenmoss projected only \$31,000 in lost profits (\$50,000 "projected" profits less \$19,000 profits actually earned), plus expenses not in excess of \$5,000.

Thus, a substantial portion of the "compensatory damages" award did not even represent *alleged* actual damages.

D&B filed a timely post-trial motion for a new trial. D&B asserted that the trial court's instructions permitted the jury to award presumed damages and authorized the jury to award punitive damages based on less demanding proof than the "actual malice" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The trial court granted D&B's motion for a new trial on all issues and concluded that its jury instructions had not met the standards of *Gertz*:

The Court made it clear in its charge that the jury was not *compelled* to award substantial damages absent actual proof of the same. However, other language in the charge may have misled the jury to believe that damages were presumed in some amount in the case.

The United States Supreme Court held in *Gertz v. Robert Welch*, 418 U.S. 324:

"The States, however, may not permit recovery of presumed or punitive damages when liability is not based on knowledge of falsity or reckless disregard for the truth, and the private defamation plaintiff who establishes liability under a less demanding standard than the New York Times test may recover compensation only for actual injury."

Reading the charge as a whole, we are persuaded that the charge permitted the jury to believe that damages could be awarded to the Plaintiff for

defamation absent proof of damages and absent a showing of knowledge of falsity or reckless disregard for the truth by the Defendant.

Commentators are in wide disagreement as to the application of *Gertz* in connection with non-media cases. Because of the Court's dissatisfaction with its charge and its conviction that the interests of justice require a new trial, the motion for the Defendant in this regard is granted. (emphasis in original).

After other post-trial proceedings, the trial court granted Greenmoss' motion for an interlocutory appeal to the Vermont Supreme Court and certified several questions concerning the propriety of its order granting a new trial. The issue underlying the certified questions was the applicability of *Gertz* to non-media defendants.

On appeal, the Vermont Supreme Court did not question the trial court's conclusion that the jury instructions were misleading under the standards enunciated in *Gertz*. Rather, the Vermont Supreme Court held that the constitutional limitations derived in *Gertz* from the First and Fourteenth Amendments were inapplicable. The Vermont Supreme Court characterized D&B as a "non-media defendant" and held:

[W]e hold that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions.

Reaffirming the propriety of an award of presumed damages, the Vermont Supreme Court also held:

[W]hen the defamation action is actionable per se the plaintiff can recover general damages with-

out proof of loss or injury, which is conclusively presumed to result from the defamation. . . .

## REASONS FOR GRANTING THE WRIT

### STATE AND FEDERAL COURT DECISIONS APPLYING GERTZ V. ROBERT WELCH, INC. IRRECONCILABLY CONFLICT AS TO BOTH RESULT AND RATIONALE.

A writ of certiorari should issue so that this Court can determine whether the constitutional protections against imposition of presumed and punitive damages in defamation cases established in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), apply to both "media" and "non-media" defendants.

This substantial First Amendment question is one which this Court has expressly reserved for decision.<sup>4</sup> It is a recurring question in both state and federal courts which only this Court can resolve. It is a question with which the lower courts are struggling and upon which they are reaching inconsistent results on uncertain and hopelessly conflicting rationales because no clear guidance has yet been given to them. This case, involving a plaintiff who is not a public figure and an allegedly defamatory statement which was neither published in a newspaper nor broadcast over

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<sup>4</sup> See *Babbit v. United Farm Workers National Union*, 442 U.S. 289, 309 (1979) ("We have not adjudicated the role of the First Amendment in suits by private parties against non-media defendants. . . ."); *Hutchinson v. Proxmire*, 443 U.S. 111, 113 n.16 (1979) ("This Court has never decided the question . . . [of whether 'the New York Times standard can apply to an individual defendant rather than to a media defendant.']").

radio or television, puts the question in clear form and provides a perfect opportunity for deciding it.

### 1. GERTZ V. ROBERT WELCH, INC. RECOGNIZED FIRST AMENDMENT LIMITATIONS ON DEFAMATION DAMAGES.

State and lower court opinions on the role of the First Amendment in defamation cases, although reaching conflicting results based upon inconsistent and indefensible rationales, have one thing in common—they all purport to be interpreting and applying the constitutional standards recognized in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). *Gertz* involved a libel action against the publisher of a monthly magazine espousing the views of the John Birch Society. The magazine had published an article describing plaintiff as a Communist sympathizer and participant in various Communist organizations and activities. Because plaintiff was a "private individual" and not a "public official" or "public figure," this Court held that the trial court erred in requiring plaintiff to meet the *New York Times Co. v. Sullivan* "actual malice" standard for liability:

We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. (emphasis added).

*Id.* at 347. This Court made equally clear, however, that private individuals who recover under liability standards less severe than actual malice nevertheless remain subject to strict constitutional limitations with respect to damages:

[W]e hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

.....

... In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.

*Id.* at 349-50. Thus, *Gertz* holds that public plaintiffs must show "actual malice" to establish liability; and that *all* defamation plaintiffs must show "actual malice" to recover presumed or punitive damages.

## 2. Lower Courts Interpreting *Gertz* Have Reached Conflicting Results.

Since this Court's decision in *Gertz*, confusion and disagreement about its applicability have plagued decisions of the state and lower federal courts. This conflict is most clearly grasped through comparison of the result reached by the Vermont Supreme Court in this case with the opposite result reached in a similar case by the Arizona courts.

In *Nelson v. Cail*, 120 Ariz. 64, 583 P.2d 1384 (Ariz.App. 1978), a building contractor accused an architect of slandering his business reputation. The contractor sought lost profits as well as punitive damages. After being instructed that it could presume damages from words which were slanderous *per se*, the jury awarded both compensatory and punitive damages. The Court of Appeals of Arizona, however, applying

*Gertz*, set aside *both* damage awards—the compensatory award on the ground that it constituted presumed damages; and the punitive award on the grounds that the *Sullivan* "actual malice" standards had not been charged.

As in *Nelson*, this case involves a private plaintiff building contractor alleging defamation to business reputation against a defendant who is neither a broadcaster nor publisher of books, magazines or newspapers. As in *Nelson*, the plaintiff here sought lost profits and punitive damages. As in *Nelson*, the jury was charged on a defamation *per se* theory of presumed damages, and was not given a proper charge with respect to "actual malice." Yet Arizona's application of *Gertz* in *Nelson* resulted in an award of nominal damages of \$1.00, while Vermont's refusal to apply *Gertz* herein resulted in a verdict of \$350,000.00, including punitive damages of \$300,000.00.

Aside from *Nelson*, the following cases extend *Gertz* to non-media defendants. *DeCarvalho v. da Silva*, R.I. \_\_\_, 414 A.2d 806 (1980); *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976); *Avins v. White*, 627 F.2d 637 (3rd Cir.), cert. denied, 449 U.S. 982 (1980); *Davis v. Schuchat*, 510 F.2d 731, 734 n.3 (D.C. Cir. 1975); *Hammerhead Enterprises, Inc. v. Brezenoff*, 551 F. Supp. 1360, 1369 (S.D. N.Y. 1982), *Woy v. Turner*, 533 F. Supp. 102 (N.D. Ga. 1981); *Bussie v. Larson*, 501 F.Supp. 1107 (M.D. La. 1980); *Beneficial Management Corp. v. Evans*, 421 So.2d 92 (Ala. 1982); *Colson v. Stieg*, 89 Ill. 2d 205, 433 N.E. 2d 246 (1982); *Millsaps v. Bankers Life Co.*, 35 Ill. App. 3d 735, 342 N.E. 2d 329 (1976); *Anderson v. Low Rent Housing Commission*, 304 N.W. 2d 239 (Iowa), cert. denied, 454 U.S. 1086 (1981); *Williams v. Pasma*, \_\_\_

Mont. \_\_\_, 656 P.2d 212 (1982); *Poorbaugh v. Mullen*, 99 N.M. 11, 653 P.2d 511 (N.M. App.), cert. denied, 99 N.M. 47, 653 P.2d 878 (1982); *Ryder Truck Rentals, Inc. v. Latham*, 593 S.W.2d 334 (Tex. Civ. App. 1979); *McQuoid v. Springfield Newspapers, Inc.*, 502 F.Supp. 1050 (W.D. Mo. 1980) (dictum).

Cases which reach the opposite result include the decision of the Vermont Supreme Court here and *Rowe v. Metz*, 195 Colo. 424, 579 P.2d 83 (1978); *Schomer v. Smidt*, 113 Cal.App.3d 828, 170 Cal.Rptr. 662 (1980); *Columbia Sussex Corp. v. Hay*, 627 S.W.2d 270 (Ky. 1982); *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252 (Minn. 1980); *Harley-Davidson Motor-sports, Inc. v. Markley*, 279 Or. 361, 568 P.2d 1359 (1977); *Denny v. Mertz*, 106 Wisc. 2d 636, 318 N.W.2d 141, cert. denied, \_\_\_ U.S. \_\_\_, 103 S. Ct. 179 (1982); *Calero v. Del Chemical Corp.*, 68 Wis. 2d 487, 228 N.W. 2d 737 (1975). See generally, *Recent Development, State Court Reactions to Gertz v. Robert Welch, Inc.: Inconsistent Results and Reasoning*, 29 Vand. L. Rev. 1431 (1976).

### 3. Decisions of Lower Courts Interpreting Gertz Are Based Upon Conflicting Rationales And Analytically Indefensible Distinctions.

Most of the courts that have faced the issue are in accord with *Nelson* and contradict the decision of the Vermont Supreme Court. In *DeCarvalho, supra*, the Rhode Island Supreme Court refused to distinguish between classes or types of defendants in the application of First Amendment principles in defamation cases:

Defining professional members of the media would be a difficult task indeed. This would re-

quire drawing distinctions between free-lance writers and the occasional author of a book, article, or pamphlet on the one hand and regularly employed agents of a great metropolitan daily newspaper or broadcasting syndicate on the other. As far as we are aware, the freedom of the press enshrined in the First Amendment was designed to apply to the lonely pamphleteer as well as to the (then unknown) syndicated columnist. In any event, the short answer to this contention is that the Supreme Court of the United States has clearly applied the *New York Times* standard to nonmedia defendants in *St. Amant v. Thompson, supra* (a candidate for public office) and in *Garrison v. Louisiana, supra* (a district attorney). Thus the trial justice was correct in drawing no distinction between defendant in this case and so-called "media defendants."

414 A.2d at 813.

Similarly, in *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976), the Maryland Court of Appeals reasoned:

Although [*New York Times v. Sullivan*] . . . arose in a media context, the holding contained no caveat restricting its application to media publications; nor has the Supreme Court hesitated to apply it in non-media cases. In *Garrison v. Louisiana*, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964), the defamatory comments were made during a press conference, and in *St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), they were made during a televised speech. In both instances, the media merely served as a vehicle for the defamatory

statements by the defendants and the Court focused on free speech and public debate rather than on the protection of the media. In *Henry v. Collins*, 380 U.S. 356, 85 S.Ct. 992, 13 L.Ed.2d 892 (1965), the Court in a short per curiam opinion applied *New York Times* where an individual who had been arrested by a police chief charged in a letter to a deputy sheriff and in a statement read to several wire services that the arrest was a "diabolical plot." Similarly, in non-media cases arising from labor disputes the Court has found the constitutional privilege applicable. *Letter Carriers v. Austin*, 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974); *Linn v. Plant Guard Workers*, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966). A number of lower courts have also applied the *New York Times* standard in non-media cases, and one court has applied *New York Times* in an action by an officer of a private club for defamations arising out of communications between club members concerning his activities. *Evans v. Lawson*, 351 F.Supp. 279 (W.D. Va. 1972).

Nor do we discern any persuasive basis for distinguishing media and non-media cases. The rationale for the application of a constitutional privilege in *New York Times*, *Curtis* and *Gertz* is that the defense of truth is not alone sufficient to assure free and open discussion of important issues. Issues of public interest may equally be discussed in media and non-media contexts, and the need for a constitutional privilege, therefore, obtains in either case. See Restatement (Second) of Torts §580A, Comment h (Tent. Draft No. 21, 1975); but cf. Nimmer, *supra*. The proposition

that the press enjoys greater rights than members of the public generally was rejected by the Supreme Court in *Pell v. Procunier*, 417 U.S. 817, 834-35, 94 S.Ct. 2800, 41 L.Ed. 495 (1974), where a newspaper argued that it had a constitutional right to interview inmates of a state correctional system despite a regulation prohibiting such contacts.

....

Any rule according less favorable treatment to certain types of non-media defendants might well present "difficult questions concerning the roles of the press and other speakers in our society." Anderson, *supra*, 53 Texas L. Rev. at 442-43 n. 95. Furthermore, most non-media private defamations arise in the context of one of the common law privileges; "[t]he completely gratuitous private defamation is rare." Thus, experience suggests that liability without fault is unusual in non-media private defamation cases. Frakt, *supra*, 6 Rutgers-Camden L.J. at 511.

Yet another reason for applying the *Gertz* holding to non-media defendants and to slander as well as libel is the compelling need for consistency and simplicity in the law of defamation. To limit the *Gertz* principles to media defendants and to cases of libel would mean one test, that of *New York Times*, for defamation of public officials and figures; another, which imposes a greater degree of proof than strict liability, and bans presumed and punitive damages, for cases brought by private plaintiffs against media defendants; and at least one more based on existing common law principles for all other defamation,

an area of tort law which, wholly apart from the advent of constitutional considerations, has traditionally been noted for its complexity. The rationale for applying the *Gertz* holding to non-media defendants and to slander as well as libel is aptly stated in the Restatement (Second) of Torts §580B, Comment e (Tent. Draft No. 21, 1975):

“. . . As the Supreme Court declares, the protection of the First Amendment extends to freedom of speech as well as to freedom of the press, and the interests which must be balanced to obtain a proper accommodation are similar. It would seem strange to hold that the press, composed of professionals and causing much greater damage because of the wider distribution of the communication, can constitutionally be held liable only for negligence, but that a private person, engaged in a casual private conversation with a single person, can be held liable at his peril if the statement turns out to be false, without any regard to his lack of fault.

. . . There is little reason to conclude that the states would now be disposed to take the traditional strict liability approach for libel actions against the communications media, which has now been declared unconstitutional, and apply it to slander actions against private individuals, where it has not previously been significant.”

350 A.2d at 694-96. *Accord, Avins v. White*, 627 F.2d 637, 649 (3rd Cir.) (“. . . [N]on-extension of the *New York Times* privilege to private individuals [as opposed to institutional press defendants] . . . creates a dangerous disequilibrium between the first amend-

ment's guarantees of freedom of speech and the press.”), *cert. denied*, 449 U.S. 982 (1980); *Anderson v. Low Rent Housing Commission*, 304 N.W.2d 239, 247 (Iowa) (finding “no basis in the plain language of the first amendment that would justify according greater protection to the media than to private parties. . .”), *cert. denied*, 454 U.S. 1086 (1981).

In *Beneficial Management Corp. of America v. Evans*, 421 So.2d 92 (Ala. 1982), the court made clear that private plaintiffs are restricted to compensation for actual injury, even in suits involving non-media defendants:

This Court has decided that the *Gertz* rule shall apply to non-media defendants; therefore, since *Gertz* abolishes the notion of “presumed damages” and limits compensation in defamation cases which are actionable per se to recovery for actual injuries only, we hereby recognize this to be the law of Alabama.

*Id.* at 96. *Accord, Poorbaugh v. Mullen*, 99 N.M. 11, 653 P.2d 511 (N.M. App.), *cert. denied*, 99 N.M. 47, 653 P.2d 878 (1982); *Millsaps v. Bankers Life Co.*, 35 Ill. App.3d 735, 342 N.E.2d 329 (1976); *Ryder Truck Rentals, Inc. v. Latham*, 593 S.W.2d 334 (Tex. Civ. App. 1979); *see also, McQuoid v. Springfield Newspapers, Inc.*, 502 F. Supp. 1050, 1054 (W.D. Mo. 1980) (“*Gertz* standards apply in *all* defamation actions regardless of the status of the defendant.”) (dictum) (emphasis in original) (*citing Rimmer v. Colt Industries Operating Corp.*, 495 F. Supp. 1217 (W.D. Mo. 1980), *rev'd on other grounds*, 656 F.2d 323 (8th Cir. 1981)).

Attempts by the Vermont Supreme Court and other minority jurisdictions to limit application of the rules

announced in *Gertz* lack sound analytical basis. In *Calero, supra*, for example, the Wisconsin Supreme Court refused to apply *Gertz*'s punitive damages rules by characterizing the content of the allegedly defamatory message:

Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment.

228 N.W.2d at 747. Yet this Court has flatly rejected attempts to analyze First Amendment protections in terms of the political utility or other supposedly beneficial content of the message. Indeed, dissatisfaction with "content" regulation was the very reason why this Court in *Gertz* discarded the "newsworthiness" test of *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). The *Gertz* Court wished to avoid

. . . forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of "general or public interest" and which do not—. . . We doubt the wisdom of committing this task to the conscience of judges.

*Gertz, supra*, 418 U.S. at 346; *see also, Sullivan, supra*, 376 U.S. at 271 ("The constitutional protection does not turn upon the truth, popularity or social utility of the ideas and beliefs which are offered."); *Time, Inc., v. Hill*, 385 U.S. 374 (1967); (applying *Sullivan* rule to *Life* magazine review of play); *Shiffrin, Defamatory Non-media Speech and First Amendment Methodology*, 25 UCLA L. Rev. 915, 926 (1978) ("*Gertz* plainly states that communications which are deemed to have nothing to do with self-government

and which do not relate to public issues fall within the ambit of first amendment protection. . .").<sup>5</sup>

Content is not the only ground upon which lower courts have managed to avoid applying *Gertz*. In this case and in others, courts have sought to restrict the class of speakers (defendants) who may invoke its protections. Like the Vermont Supreme Court here, the court in *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252 (Minn. 1980) sought to limit *Gertz* to some undefined class of "media" defendants. And in *Columbia*

<sup>5</sup>Prior to *Gertz*, some courts had applied *Rosenbloom's* now discarded "public interest test" to deny First Amendment protection to financial reports. *See Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25 (5th Cir. 1973), cert. denied, 415 U.S. 985 (1974); *Grove v. Dun & Bradstreet, Inc.*, 438 F.2d 433 (3rd Cir.) ("business or credit standing" held not a "matter of real public interest"), cert. denied, 404 U.S. 898 (1971); *Kansas Electric Supply Co. v. Dun & Bradstreet, Inc.*, 448 F.2d 647 (10th Cir. 1971), cert. denied, 405 U.S. 1026 (1972). These decisions involved precisely the type of *ad hoc* content-based adjudication ended by *Gertz's* rejection of *Rosenbloom*.

Moreover, to the extent content remains at all pertinent, this Court has since made clear that the type of financial information at issue herein is unquestionably worthy of First Amendment protection. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), this Court acknowledged society's "strong interest in the free flow of commercial information;" and pointed out that the "consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763 and 764. *See Christie, supra*, 75 Mich. L. Rev. at 66 ("[T]he distinction between commercial and noncommercial speech is breaking down, as well it should. Freedom of speech is, after all, of concern in commercial as well as in other contexts."); *see also, Hammerhead, supra*, 551 F. Supp. at 1369 ("There is no requirement that a defendant seek broad public circulation of his views in order to be protected by *New York Times v. Sullivan*").

*Sussex Corp. v. Hay*, 627 S.W.2d 270, 277 (Ky. 1982), *Gertz* was held applicable only to a group designated as the “communication industry.”

These speaker-based distinctions are ultimately indefensible. *First*, to the extent these distinctions are based upon the “worth” or “value” of messages likely to be disseminated by particular speakers, they are merely a disguised form of the type of “content” regulation previously rejected by this Court and inconsistent with First Amendment jurisprudence. See Note, *Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Nonmedia Defendants*, 95 Harv. L. Rev. 1876, 1885-86 (1982). *Second*, the distinction produces arbitrary results—a newspaper or television broadcasting verbatim the statement of an individual can “create” a constitutional privilege otherwise inapplicable to the individual’s statement. Or, as in this case, the same financial information published by D&B would have been adjudicated differently if published in a local newspaper. *Third*, the justification for imposing more lenient rules upon the institutional press—paid professionals whose widespread communications threaten the greatest damage—is doubtful. *Jacron, supra*, 350 A.2d at 695. *Fourth*, such distinction injects needless complexity into the law to the extent “media” and “non-media” defendants are to be differentiated and then subjected to differing standards, sometimes even in the context of the same case. See *The Public Figure Plaintiff, the Nonmedia Defendant and Defamation Law: Balancing the Respective Interests*, 68 Iowa L. Rev. 517, 524 n.56 (1983) (“[T]he definitions of public figure and media defendant are unclear.”) *Finally*, a special and exalted status for the press in defamation cases is unsupportable as a matter of constitutional history. See

*First National Bank of Boston v. Bellotti*, 435 U.S. 765, 797-802 (1978) (Burger, C.J., concurring); Lange, *The Speech and Press Clauses*, 23 UCLA L. Rev. 77 (1975).

This Court has never expressly limited its holdings in *Sullivan* or *Gertz* to “media” or any other class of defendants. *Sullivan* itself applied the same “actual malice” test to both *The New York Times* as well as the private individual defendants who had placed the allegedly defamatory advertisement. *Sullivan, supra*, 376 U.S. at 286. *Accord, St. Amant v. Thompson*, 390 U.S. 727 (1968) (*Sullivan* test applied in case involving individual not a member of institutional press). Thus, apart from engendering confusion and unfairness, the decision of the Vermont Supreme Court and others like it depart from this Court’s attempted development of a coherent body of constitutional law in defamation cases. D&B respectfully submits that the time has come for this Court to reach and decide the questions raised by this petition.

Commentators have bemoaned the chaotic state of defamation law and have urged that this Court re-examine it. See Christie, *Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches*, 75 Mich. L. Rev. 43 (1976); Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. Rev. 915, 935 (1978); Note, *Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Nonmedia Defendants*, 95 Harv. L. Rev. 1876 (1982) (advocating novel “context-based” transactional approach).

As Professor Christie has persuasively reasoned:

[T]he distinction between the press and the rest of us will simply not hold up, either on historical or practical grounds.

....

The law in the area of injury to reputation is on the verge of chaos. Attempts by the Court to eliminate confusion have almost invariably increased it. The underlying reason for these difficulties is likely traced to the fundamental assumption in *Sullivan* that it is possible to have different standards of liability depending on who is involved or, as the later cases have demonstrated, on what is involved.

....

[One] . . . reason to believe that the . . . Court will be obliged to generalize the *Gertz* solution to cover all cases of injury to reputation is the Court's gradually increasing awareness that many of the traditional methods of distinguishing among types of speech do not make much sense.

....

*The only way to accommodate all the conflicting interests in a manner that is socially acceptable, therefore, will be to generalize the Gertz negligence and actual damage solution.*

Christie, *supra*, 75 Mich. L. Rev. at 58, 63, 64, 66 (emphasis added), *Accord*, 52 Wash. L. Rev. 975, 979 n.29 (1977); Shiffrin, *supra*, 25 UCLA L. Rev. 915, 935 (1978); *see also*, *Qualified Privilege to Defame Employees And Credit Applicants*, 12 Harv. C.R.-C.L.L. Rev. 143, 173 (1977) (Supreme Court extension of *Gertz* to all defendants deemed "likely").

## CONCLUSION

Holding squarely that the First Amendment's limitations on damages for libel are inapplicable to non-media defendants, the Vermont Supreme Court approved the trial court's presumed and punitive damages instructions. D&B respectfully submits that a writ of certiorari should issue so that this Court can reverse the Vermont Supreme Court's holding that *Gertz* is inapplicable to non-media defendants.

The issue presented in this case transcends the interests of the individual litigants. Conflict and confusion as to the applicability of *Gertz* are rampant in both the state and federal courts. The recurring split in results reached by the courts, as well as the inconsistent and indefensible rationales offered even among courts reaching the same result, attest to the need for resolution of the questions posed by this petition. Issuance of the writ is vital to ensure effective and fair implementation of the fundamental dictates of the First Amendment.

Respectfully submitted,

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# **APPENDIX**

## APPENDIX A

## ENTRY ORDER

**SUPREME COURT DOCKET NO. 173-81  
NOVEMBER TERM, 1982**

APPEALED FROM:  
Greenmoss Builders, Inc. } Washington Superior Court  
v.  
Dun & Bradstreet, Inc. } DOCKET NO. S326-  
77WnC

In the above entitled cause the Clerk will enter:

*Certified questions one and two are answered in the affirmative; certified questions three, parts (a) through (c), and four are answered in the negative.*

FOR THE COURT:

Dissenting: /s/ WILLIAM C. HILL,  
Associate Justice

**Concurring:**

/s/ ALBERT W. BARNEY,  
Chief Justice

*/s/* **FRANKLIN S. BILLINGS, JR.,**  
Associate Justice

/s/ WYNN UNDERWOOD,  
Associate Justice

/s/ LOUIS P. PECK,  
Associate Justice

## No. 173-81

Greenmoss Builders, Inc. Supreme Court

v.  
On Appeal from  
Washington Superior  
Court

Dun & Bradstreet, Inc. November Term, 1982

Thomas L. Hayes, J.

Villa & Heilmann, Burlington, for plaintiff-appellant  
Young & Monte, Northfield, for defendant-appellee

PRESENT: Barney, C.J., Billings, Hill, Underwood  
and Peck, JJ.

HILL, J. Plaintiff, a residential and commercial building contractor, brought this defamation action against defendant as a result of an erroneous credit report issued to defendant's subscribers (plaintiff's creditors). The credit report alleged that plaintiff had filed a voluntary petition in bankruptcy and, in addition, grossly misrepresented plaintiff's assets and liabilities. The false nature of the report's allegations has never been disputed.

In its complaint, plaintiff asserted that the consequences of defendant's report, which it insisted was published with reckless disregard for truth and accuracy, were a damaged business reputation, loss of company profits, and loss of money expended to correct the error. In response, defendant claimed both a constitutional and common law qualified privilege against defamation actions, and on that basis contended that since its report was published in good faith, it could not be held liable.

After a trial by jury, a verdict was returned in favor of plaintiff for \$50,000 in compensatory or actual damages, and \$300,000 in punitive damages. Thereafter, defendant filed timely motions for judgment notwithstanding the verdict, V.R.C.P. 50, and for new trial, V.R.C.P. 59, on the issues of liability and damages. The trial court, persuaded that the evidence was sufficient as a matter of law to create issues of fact for the jury as to both liability and damages, denied defendant's motions for judgment notwithstanding the verdict. Upon reviewing its jury instructions, however, the trial court concluded that it had incorrectly charged those standards of liability enunciated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and granted defendant's motions for new trial on all issues.

This action is before us pursuant to an Interlocutory Order by the Washington Superior Court, V.R.A.P. 5(b)(1), certifying five questions of law for our resolution. (1) Did the trial court err in granting defendant's motion for a new trial on all issues? (2) If the answer to the first question is in the affirmative, should the court have entered judgment on the verdict? (3) If the answer to the first question is in the affirmative, should the court have ordered a new trial on: (a) damages only? (b) compensatory damages only? (c) punitive damages only? (4) Did the court err in denying all motions of the defendant for judgment notwithstanding the verdict? (5) If the answer to the fourth question is in the affirmative, should the court have: (a) granted defendant's motion to enter judgment for the defendant on the issue of punitive damages, notwithstanding the verdict? (b) granted the motion of the defendant for judgment on the issue of compensatory damages, notwithstanding the verdict? (c) granted judgment for the defendant on all issues? In light of

our disposition of the first four questions, we need not address the fifth question.

We begin with a review of the record. Defendant operates a business in which factual and financial reports about individual business enterprises are issued exclusively to subscribers of defendant's service. These subscribers, usually creditors of the reported enterprises, may contract for "continuous service reports" which enable them to receive all report updates about a particular business over a year's time from the subscriber's initial inquiry. The reports are based on information solicited from the business itself, the business' banking and credit sources, from trade suppliers, and from public records such as annual reports filed with the Secretary of State and reports of bankruptcy petitions.

On or about July 26, 1976, plaintiff's president met with a representative of its principal creditor, a bank, to discuss the possibility of future financing. During the meeting, the bank's representative informed plaintiff's president that he had just received a credit report issued by defendant indicating that plaintiff had recently filed a voluntary petition in bankruptcy. Plaintiff's president testified that he was both shocked and confused when confronted with the report, since plaintiff had never filed such a petition and, at the time the report was published, plaintiff's business was steadily expanding. In fact, plaintiff's president later testified that prior to the issuance of the credit report, plaintiff had never suffered a major economic reversal and its financial condition was sound. Nevertheless, despite the bank representative's trial testimony that he never really believed the report, the bank put off any future consideration of credit to plaintiff until the

discrepancy was cleared up. The bank later terminated plaintiff's credit allegedly for reasons unrelated to the report.

Plaintiff's president immediately contacted defendant's regional office in Manchester, New Hampshire. He explained the error to defendant's regional supervisor and requested, in addition to an immediate correction, a list of those creditors who had received the false reports in order that they might be reassured of plaintiff's solvency. Defendant's representative stated that the matter would be looked into, but refused to divulge to plaintiff's president the names of the creditors who had received the report.

The basis of the error was established at trial: a former employee of plaintiff, and not plaintiff, had filed a voluntary petition in bankruptcy. Defendant's employee, a seventeen year old high school student, paid \$200 annually to review Vermont's bankruptcy petitions, had inadvertently attributed the former employee's bankruptcy petition to plaintiff itself, and reported the information as such to defendant. A representative of defendant testified that prior to the issuance of a credit report indicating a bankrupt business, it was defendant's routine practice first to check the report's accuracy with the business itself. No pre-publication verification was ever attempted in the present case.

On or about August 3, 1976, having satisfied itself that its credit report on plaintiff was wrong, defendant issued a corrective notice to the five subscribers who had received the initial report. In substance, the corrective notice stated that it was a former employee of plaintiff, not plaintiff itself, who had filed the petition in bankruptcy, and that plaintiff "continued in busi-

ness as usual." Plaintiff informed defendant that it was dissatisfied with the corrective notice, since it implied that the initial mistake was attributable to plaintiff, not defendant. Plaintiff again demanded a list of subscribers who had seen the report, but its request was once again denied.

Thereafter, plaintiff refused to provide defendant with any further financial data, and requested that defendant inform anyone seeking such data that it was being withheld pending the outcome of plaintiff's defamation action against defendant. Instead, defendant issued plaintiff a "blank rating," indicating that plaintiff's circumstances were "difficult to classify" within defendant's rating system, and such information was distributed to those creditors who requested a current indication of plaintiff's financial status. A short while later, plaintiff commenced its defamation action.

### I.

In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the United States Supreme Court held that a "public official" was prohibited "from recovering damages for a defamatory falsehood relating to his official conduct unless he [or she] proves that the statement was made with 'actual malice,' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80; *Burns v. Times Argus Association*, 139 Vt. 381, 384, 430 A.2d 773, 775 (1981). Three years later, the media protection established in *New York Times* was extended to cover defamatory falsehoods published about "public figures." *Curtis Publishing Company v. Butts*, 388 U.S. 130, 155 (1967). In *Gertz v. Robert Welch, Inc.*, *supra*, the Supreme Court, in the last major pronouncement of protections afforded the media in defamation actions,

held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a *private individual*." *Id.* at 347 (emphasis added). Although *Gertz* permitted a "private individual" to recover actual damages, presumed or punitive damages were not permitted absent proof of the *New York Times* standard "of knowledge of falsity or reckless disregard for the truth. *Id.* at 348.

The critical issue underlying the certified questions presented, a matter of first impression for this Court, is whether the First and Fourteenth Amendments to the United States Constitution require that the qualified protections afforded the media in "private" defamation actions, as set forth in *Gertz*, be extended to actions involving nonmedia defendants. Although the issue has never been decided by the United States Supreme Court, see *Hutchinson v. Proxmire*, 443 U.S. 111, 133 n.16 (1979), it has been addressed in a number of state courts. See, e.g., *Denny v. Mertz*, 106 Wis. 2d 636, 318 N.W.2d 141 (1982); *Rowe v. Metz*, 195 Colo. 424, 579 P.2d 83 (1978); *Harley Davidson Motor-sports, Inc. v. Markley*, 279 Or. 361, 568 P.2d 1359 (1977); *Jacron Sales, Inc. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1975). Since the basis of the trial court's decision to grant a new trial was its allegedly faulty jury instruction regarding the *Gertz* standards of liability and damages, a threshold determination as to *Gertz*'s applicability to the facts of this case is crucial.

In support of its claim that *Gertz*, as a matter of federal constitutional law, should apply to nonmedia as well as media defendants, defendant asserts that the former have equally compelling First Amendment

rights worthy of constitutional protection, and as such it questions the logic of affording the press exclusive immunity from the consequences of defamation. Additionally, defendant insists that distinctions between media and other information disseminating defendants are quite often illusory, and concludes that it should be considered a "publisher or broadcaster" for purposes of First Amendment protection.

We are fully aware that in certain instances the distinction between media and nonmedia defendants may be difficult to draw. However, no such difficulty is presented with credit reporting agencies, which are in the business of selling financial information to a limited number of subscribers who have paid substantial fees for their services. As a result of a contractual arrangement between defendant and its subscribers, the procured information is to be kept confidential. There is a clear distinction between a publication which disseminates news for public consumption and one which provides specialized information to a selective, finite audience. We therefore reject, as have the majority of circuit courts, the assertion that credit agencies such as defendant are the type of media worthy of First Amendment protection as contemplated by *New York Times* and its progeny. See, e.g., *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829, 833 (8th Cir. 1976); *Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25, 29 (5th Cir.), cert. denied, 415 U.S. 985 (1973); *Oberman v. Dun & Bradstreet, Inc.*, 460 F.2d 1381, 1383 (7th Cir. 1972); *Kansas Elec. Supply Co., Inc. v. Dun & Bradstreet, Inc.*, 448 F.2d 647, 649 (10th Cir. 1971), cert. denied, 405 U.S. 1026 (1972); *Grove v. Dun & Bradstreet, Inc.*, 438 F.2d 433, 437 (3d Cir.), cert. denied, 404 U.S. 898 (1971).

Moreover, in carefully surveying the decisions of those jurisdictions which have specifically addressed the issue of whether *Gertz* should be applied to nonmedia defendants, we note that the majority have refused such an extension. Although we are not bound by these decisions, their reasoning is both persuasive and compelling. In nonmedia defamation actions, "[t]he crucial elements . . . which brought the United States Supreme Court into the field of defamation law are missing. There is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press." *Harley Davidson Motorsports, Inc. v. Markley*, *supra*, 279 Or. at 366, 568 P.2d at 1363. Consequently, the Supreme Court of Oregon concluded:

Because a private individual's right to recover for libel has been made more difficult in situations in which his interests have been at least partially outweighed by important constitutional values, it does not follow, for obvious reasons, that his recovery should be made more difficult in situations in which no such constitutional values are involved merely for the sake of securing symmetry of treatment of defendants. It is our conclusion that *Gertz* does not require application of the constitutional privilege to actions of defamation between private parties insofar as the issues raised here are concerned.

*Id.* at 370-71, 568 P.2d at 1365. For other cases holding *Gertz* inapplicable to nonmedia defamation actions, see generally *Denny v. Mertz*, *supra*; *Fleming v. Moore*, 221 Va. 884, 275 S.E.2d 632 (1981); *Schomer v. Smidt*, 113 Cal. App. 3d 828, 170 Cal. Rptr. 662 (1980);

*Gengler v. Phelps*, 92 N.M. 465, 589 P.2d 1056 (1979); *Rowe v. Metz*, *supra*; *Retail Credit Company v. Russell*, 234 Ga. 765, 218 S.E.2d 54 (1975); *cf. Jacron Sales Company, Inc. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1975); Restatement (Second) Torts § 480B, Comment e.

In light of the above, we are convinced that the balance must be struck in favor of the private plaintiff defamed by a nonmedia defendant. "Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues . . . ." *Gertz v. Robert Welch, Inc.*, *supra*, 418 U.S. at 340 (quoting *New York Times v. Sullivan*, *supra*, 376 U.S. at 270). Accordingly, we hold that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions.

## II.

In the alternative, defendant contends that in the absence of a constitutional mandate, this Court should nevertheless adopt *Gertz* in the interests of fairness, simplicity and clarity in our state common law. Defendant's argument is based on the fear that without a heightened standard of protection in defamation actions, individuals will withdraw from, rather than pay the price of entry into, "the marketplace of ideas." Moreover, defendant insists that our common law, like the common law in the vast majority of other jurisdictions, see *Prosser, Law of Torts*, c. 19, § 115 (4th ed. 1971) and cases cited in 30 A.L.R. 2d 776 (1953), has already recognized, at least implicitly, a qualified common law privilege for credit reporting agencies. We disagree.

In *Nott v. Stoddard*, 38 Vt. 25 (1865), this Court recognized that there are certain exceptions to our general common law rule that malice will be presumed when words are in themselves defamatory and thus actionable per se:

Cases of giving the character of servants, confidential advice for some legitimate purpose, communications to persons who ask for information and have a right or interest to know, are of this character. In such cases malice must be proved by extrinsic evidence, or inferred as a matter of fact by the jury from the circumstances.

*Id.* at 32. Although we have never *expressly* denied credit reporting agencies a qualified privilege, we have done so implicitly: "[I]f the words impute some quality, the natural tendency of which is to impair the plaintiff's professional or business character, as insolvency to a merchant, . . . they are actionable . . ." *Darling v. Clement*, 69 Vt. 292, 300, 37 A. 779, 781 (1897) (citations omitted).

In balancing the equities between a credit reporting agency and the individual it has defamed through a false credit report, we note that "[a]n individual living in a world more and more dominated by large commercial entities is less able to bear the burden of the consequences of a false credit or character report than the agency in the business of selling these reports." *Retail Credit Company v. Russell*, *supra*, 234 Ga. at 770, 218 S.E.2d at 58. In light of the fact that our common law has never recognized a qualified privilege against defamation actions for credit reporting agencies, and given the absence of compelling policy reasons to do so now, we decline to adopt the rules set forth in *Gertz* as part of our common law.

## III.

With regard to the question of damages, we note that "the availability of both general and punitive damages in libel actions has not been rejected as a matter of constitutional law." *Michlin v. Roberts*, 132 Vt. 154, 163, 318 A.2d 163, 169 (1974). "When the defamation action is actionable per se the plaintiff can recover general damages without proof of loss or injury, which is conclusively presumed to result from the defamation, but he is not required to rely solely upon the implications that are applicable and may present any evidence of competent character that is authorized by his pleadings, for the purpose of showing the extent of injury and the amount of the compensation that should be awarded." *Lancour v. Herald & Globe Association*, 112 Vt. 471, 475, 28 A.2d 396, 399 (1942) (citing *Nott v. Stoddard*, *supra*, 38 Vt. at 30).

Likewise, in accordance with this Court's belief that "[p]unitive damages are awarded to 'stamp the condemnation of the jury upon the acts of defendant on account of their malicious character,'" *Pezzano v. Bonneau*, 133 Vt. 88, 92, 329 A.2d 659, 661 (1974) (quoting *Goldsmith's Admr. v. Joy*, 61 Vt. 488, 500, 17 A. 1010, 1014 (1889)), their availability in defamation actions involving "malice" has never been questioned. *Lancour v. Herald & Globe Association*, *supra*, 112 Vt. at 478, 28 A.2d at 401 (citing *Smith v. Moore*, 74 Vt. 81, 86, 52 A. 320, 321 (1901)). Although each case stands upon its own facts, *Woodhouse v. Woodhouse*, 99 Vt. 91, 154, 130 A. 758, 788 (1925), we have indicated that "malice may be shown by conduct manifesting personal ill will or carried out under circumstances evidencing insult or oppression, or even by conduct showing a reckless or wanton disregard of one's rights." *Shortle v. Central Vermont Public Service*

*Corporation*, 137 Vt. 32, 33, 399 A.2d 517, 518 (1979) (citing *Sparrow v. Vermont Savings Bank*, 95 Vt. 29, 33, 112 A. 205, 207 (1921)); *Lancour v. Herald & Globe Association*, *supra*, 112 Vt. at 482, 28 A.2d at 402; *Woodhouse v. Woodhouse*, *supra*, 99 Vt. at 155, 130 A. at 788.

Since "punitive damages are incapable of precise determination, their assessment is 'largely discretionary with the jury,'" *Lanfranconi v. Tidewater Oil Company*, 376 F.2d 91, 96 (2nd Cir. 1967) (quoting *Gray v. Janicki*, 118 Vt. 49, 52, 99 A.2d 707, 709 (1953)), and said assessment will not be interfered with unless "manifestly and grossly excessive." *Pezzano v. Bonneau*, *supra*, 133 Vt. at 91, 329 A.2d at 661 (quoting *Gray v. Janicki*, *supra*, 118 Vt. at 52, 99 A.2d at 709). We have cautioned, however, that though "the verdict may be considerably more or less than, in the judgment of the court, it ought to have been, still it will decline to interfere unless the amount is so great or small as to indicate that it is the result of perverted judgment, accident or gross mistake." *Woodhouse v. Woodhouse*, *supra*, 99 Vt. at 157, 130 A. at 789.

## IV.

Guided by the rulings and principles outlined above, we turn to the certified questions raised by both parties regarding the propriety of the trial court's refusal to set aside the jury verdicts, V.R.C.P. 50, as well as its decision to grant a new trial on all issues. V.R.C.P. 59. As a basis for its motions, defendant argued that the verdicts were not supported by the evidence, in that the *Gertz* standards had not been met, that they were the product of passion and not reason, and that they were clearly excessive. In its order, the trial court noted that it had reviewed the jury instructions, all

memoranda submitted, the evidence of record, the verdict rendered by the jury and the applicable law. Persuaded that the evidence was "sufficient as a matter of law to create issues of fact for the jury with respect to both liability and damages," the trial court denied defendant's motions for judgment notwithstanding the verdict.

Defendant contends that the trial court abused its discretion in denying defendant's motions to set aside the verdicts. A careful review of the record discloses that defendant failed to renew, at the close of all the evidence, its earlier motions for a directed verdict on the issues of liability and compensatory damages. Thus, defendant's motions for judgment notwithstanding the verdict as to these two issues were properly denied. *Proctor Trust Company v. Upper Valley Press, Inc.*, 137 Vt. 346, 349, 405 A.2d 1221, 1223 (1979); *Palmissano v. Townsend*, 136 Vt. 372, 375, 392 A.2d 393, 395 (1978); *Houghton v. Leinwohl*, 135 Vt. 380, 381-82, 376 A.2d 733, 735-36 (1977); V.R.C.P. 50(b).

In determining whether the trial court abused its discretion by refusing to set aside the punitive damages award on the grounds that it was excessive, this Court is "bound to indulge every reasonable presumption in favor of the ruling below, bearing in mind that the trial court was in a better position to determine the question." *Towle v. St. Albans Publishing Company, Inc.*, 122 Vt. 134, 142, 165 A.2d 363, 368 (1960) (citing *Lancour v. Herald & Globe Association*, *supra*, 112 Vt. at 483, 28 A.2d at 403). In short, defendant must show that the ruling is clearly untenable and without any reasonable basis of support in the record. *Id.* (citing *Stone v. Briggs*, 112 Vt. 410, 415, 26 A.2d

828, 831 (1942)); *Dashnow v. Myers*, 121 Vt. 273, 279, 155 A.2d 859, 864 (1959).

We are not persuaded that the trial court abused its discretion in denying defendant's motion to set aside the verdict as to the issue of punitive damages.<sup>1</sup> There was ample evidence in the record to enable the jury to conclude that defendant's conduct was insulting, reckless, and in total disregard of plaintiff's rights. *Shortle v. Central Vermont Public Service Corporation*, *supra*, 137 Vt. at 33, 399 A.2d at 518. As noted above, "the size of the verdict alone does not indicate passion or prejudice by the jury." *Pezzano v. Bonneau*, *supra*, 133 Vt. at 91, 329 A.2d at 661 (citing *Gray v. Janicki*, *supra*, 118 Vt. at 51, 99 A.2d at 709). We are not convinced that the trial court abused its discretion in denying defendant's motions for judgment notwithstanding the verdict on the issue of punitive damages. Accordingly, the fourth certified question for review, whether the trial court erred in denying all motions of defendant for judgment notwithstanding the verdict, is answered in the negative.

In the second part of its order, the trial court, persuaded that its jury instructions "permitted the jury to believe that damages could be awarded to the [p]laintiff for defamation absent proof of damages and absent a showing of a knowledge of falsity or reckless

---

<sup>1</sup> In its brief, defendant contends for the first time on appeal that in the absence of evidence of corporate involvement, punitive damages may not be assessed. "[W]e have repeatedly held that issues not raised below, even those having a constitutional dimension, will not be considered when presented for the first time on appeal." *State v. Patnaude*, 140 Vt. 361, 368, 438 A.2d 402, 404 (1981) (citing *State v. Prue*, 138 Vt. 331, 331-32, 415 A.2d 234, 234 (1980)).

disregard for the truth by the [d]efendant," granted defendant's motion for new trial on all issues. That is, defendant's motion for new trial was granted on the basis of the trial court's belief that its charge to the jury, insofar as it related to the *Gertz* standards of liability, was confusing. In view of the fact that our decision today holds *Gertz* totally inapplicable to the present case, we find the error harmless. In fact, we have carefully reviewed the jury instructions, and in addition to being properly charged in line with our common law rules as to liability and damages, defendant was afforded a common law qualified privilege against credit report agencies along with the ill-charged constitutional privilege outlined in *Gertz*. In short, defendant has nothing to complain about, since it received two beneficial charges to which it was not entitled.

*Certified questions one and two are answered in the affirmative; certified questions three, parts (a) through (c), and four are answered in the negative.*

FOR THE COURT:

---

Associate Justice

## APPENDIX B

STATE OF VERMONT  
WASHINGTON COUNTY ss.

GREENMOSS BUILDERS

v

DUN & BRADSTREET

SUPERIOR COURT  
WASHINGTON  
COUNTY  
DOCKET NO. S326-  
77WnC

## ORDER

The above-entitled cause came on for hearing before the Washington Superior Court on defendant's Motion for: Judgment for the defendant notwithstanding the verdict; for judgment on the issue of punitive damages notwithstanding the verdict; for judgment on the issue of a compensatory damages notwithstanding the verdict; and for a new trial of all issues in the above-captioned matter.

The Court has reviewed the instructions given the jury in this cause, and memoranda submitted, and has considered the evidence of record, the verdict rendered by the jury and the applicable law.

We are persuaded that the evidence is sufficient as a matter of law to create issues of fact for the jury with respect to both liability and damages. Therefore, all motions for judgment notwithstanding the verdict must be denied.

The more troublesome question is whether defendant should prevail on its motion for a new trial.

The Court made it clear in its charge that the jury was not compelled to award substantial damages absent actual proof of the same. However, other language

in the charge may have misled the jury to believe that damages were presumed in some amount in the case.

The United States Supreme Court held in *Gertz v. Robert Welch*, 418, U.S. 324:

"The States, however, may not permit recovery of presumed or punitive damages when liability is not based on knowledge of falsity or reckless disregard for the truth, and the private defamation plaintiff who establishes liability under a less demanding standard than the New York Times test may recover compensation only for actual injury."

Reading the charge as a whole, we are persuaded that the charge permitted the jury to believe that damages could be awarded to the Plaintiff for defamation absent proof of damages and absent a showing of knowledge of falsity or reckless disregard for the truth by the Defendant.

Commentators are in wide disagreement as to the application of *Gertz* in connection with non-media cases. Because of the Court's dissatisfaction with its charge and its conviction that the interests of justice require a new trial, the motion for the Defendant in this regard is granted.

In view of the foregoing, it is hereby ORDERED and ADJUDGED:

1. That all motions of the Defendant for judgment notwithstanding the verdict are DENIED.
2. That Defendant's motion for a new trial on all issues is GRANTED.

Dated at Montpelier, County of Washington, this 19th day of October 1980.

Thomas L. Hayes  
Superior Judge

Willis C. Bragg  
Assistant Judge

Patricia B. Jensen  
Assistant Judge

**APPENDIX C**

STATE OF VERMONT	)	WASHINGTON
	:SS.	SUPERIOR
COUNTY OF WASHINGTON	)	COURT
		Docket No. S-
		326-77

GREENMOSS BUILDERS, INC.	)
	)
	)
v.	)
	)
DUN & BRADSTREET, INC.	)

***POST-TRIAL MOTIONS UNDER RULES 50 AND  
59***

NOW COMES the defendant, by and through its attorneys, Young & Monte, and moves pursuant to Rules 50 and 59 that the Court:

1. Enter judgment for the defendant notwithstanding the verdict.
2. Enter judgment for the defendant on the issue of punitive damages notwithstanding the verdict.
3. Enter judgment for the defendant on the issue of compensatory damages notwithstanding the verdict.
4. Order a new trial of all issues in the above-captioned matter.

The within motions are made in the alternative and defendant expressly reserves its right to appeal the jury verdict in this matter.

Further, the defendant calls to the Court's attention for its consideration in the context of the within motions that Rule 59 requires that a new trial shall not be

granted solely on the ground that damages are excessive until the prevailing party has been given an opportunity to remit such portion thereof as the Court deems to be excessive.

Defendant has filed its memorandum in support of the within motions simultaneously with the filing hereof.

DATED at the Town of Northfield, County of Washington, and State of Vermont this 29th day of April, 1980.

DUN & BRADSTREET, INC.  
By Its Attorneys  
YOUNG & MONTE

By: Peter J. Monte

cc.: Thomas L. Heilmann, Esq.

#### APPENDIX D

STATE OF VERMONT	)	WASHINGTON
COUNTY OF WASHINGTON )	:SS. )	SUPERIOR )
		COURT )
		Docket No. S-326-77

GREENMOSS BUILDERS, INC.	)
v.	)
DUN & BRADSTREET, INC.	)

DEFENDANT'S MEMORANDUM IN SUPPORT  
OF  
POST-TRIAL MOTIONS UNDER RULES 50 AND  
59

.....

#### GROUND FOR RELIEF

1. *The Federal Constitution Requires a Clear Showing of Malice, Narrowly Defined, to Support Any Award of Punitive Damages.*
4. *The Court's Instructions Permitted the Jury, Contrary to Constitutional Law, to Award Presumed Damages.*

.....

D2

....  
DATED at the Town of Northfield, County of Washington, and State of Vermont this 29th day of April, 1980.

Respectfully submitted,  
**DUN & BRADSTREET, INC.**  
By Its Attorneys  
**YOUNG & MONTE**

By: Peter J. Monte

E1

## APPENDIX E

### DUN & BRADSTREET, INC.

### SPECIAL NOTICE

D-U-N-S

No. 06-675-5349	Jul. 26, 1976	Rating	NQ
Greenmoss Builders			Formerly
Inc.			
	Building Contractor		EE2
Box 517		Started	1971
RTE #100	SIC Nos.		
Waitsfield, VT 05673	15 22 15 42 15 31		
	Tel. 802 496-3124		

## PETITION UNDER NATIONAL BANKRUPTCY ACT

### Voluntary Petition In Bankruptcy Filed Under Chapter IV

Date of Filing: July 1, Case # 76-201  
1976

City & State Filed:  
Burlington, VT

Filed By: Richard Brock

**Plaintiff's  
2**

#### LIABILITIES:

Total: \$ 37,729

#### ASSETS:

Total: 26,835

Attorney: Richard Brock, Box 725, Montpelier, VT  
Referee: Charles J. Marro, Merchants Row,  
Rutland, VT

07-28(76 /34 ) 0056/02 6 092

This report is submitted only to J. Flanagan for the purpose of confirming accuracy and is not to be exhibited or its contents revealed to anyone else. It should be returned to Dun & Bradstreet, Inc. within 7 days.

F1

**APPENDIX F**

**DUN & BRADSTREET, INC.**

**SPECIAL NOTICE**

D-U-N-S

No. 06-675-5349 Aug. 3, 1976

Rating —

Greenmoss Builders

Inc.

Building Contractor Started 1971

Box 357

Rte. #100 SIC Nos.

Waitsfield, VT 05673 15 22 15 42 15 31

Tel. 802 496-2561

**Plaintiff's**  
**3**

**CORRECTION CORRECTION CORRECTION**

Any report to the effect that this corporation filed a voluntary petition in bankruptcy on July 1, 1976 under Chapter IV, file number 76-201 is erroneous and should be disregarded. The facts are that the bankruptcy was filed individually by an employee of this corporation. Greenmoss Builders Inc. continues operations as previously reported.

08-03(13 /29 )0176/06 41501 6 092

This report is submitted only to \_\_\_\_\_ for the purpose of confirming accuracy and is not to be exhibited or its contents revealed to anyone else. It should be returned to Dun & Bradstreet, Inc. within \_\_\_\_\_ days.

No. 83-18  
IN THE  
**Supreme Court of the United States**  
October Term, 1983

Office - Supreme Court, U.S.  
**FILED**  
**AMG 11 1983**  
ALEXANDER L. STEVAS.  
**CLERK**

DUN & BRADSTREET, INC.,

*Petitioner,*

vs.

GREENMOSS BUILDERS, INC.,

*Respondent.*

On Petition for a Writ of Certiorari to the  
Supreme Court of the State of Vermont

**RESPONDENT'S OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT  
OF THE STATE OF VERMONT**

Thomas F. Heilmann  
THOMAS F. HEILMANN, P.C.  
Five Burlington Square  
P.O. Box 216  
Burlington, Vermont 05402-0216  
802-864-4555

Counsel for Respondent

THE VILLAGE PRESS, INC., 44 Park Street, Essex Junction, Vermont 05452

**BEST AVAILABLE COPY**

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**OPINIONS BELOW**

The Charge to the Jury delivered by the Superior Court of Washington County, Vermont, is unreported. The pertinent portions thereof are printed in Respondent's Appendix at A1-A4.

**STATEMENT OF THE CASE****1. The Facts.**

On July 26th, 1976, Respondent, Dun & Bradstreet, Inc., (hereinafter D & B), published a notice that Respondent, Greenmoss Builders, Inc. (hereinafter Greenmoss) had filed a voluntary Petition in Bankruptcy. It is conceded that this report was totally false and groundless. In addition to falsely reporting that Greenmoss had filed bankruptcy, Petitioner grossly understated the assets and liabilities of Respondent. This report was so completely inconsistent with previous reports about Greenmoss obtained by D & B, particularly with respect to assets and liabilities, that D & B knew or should have known that the information about Greenmoss's bankruptcy was inaccurate.

The report was published because Petitioner's employee, a 17-year-old high school student who had been given no training by D & B, had mistakenly analyzed a Bankruptcy Petition filed in the United States District Court for the District of Vermont and inaccurately attributed the Bankruptcy Petition to Greenmoss. The evidence was that prior to the issuance of a credit report indicating a bankrupt business, D & B's routine practice and requirements mandated a check of the report's accuracy with the business

alleged to be bankrupt. D & B admitted that no pre-publication verification was ever attempted in this case.

Prior to the commencement of suit, D & B steadfastly refused to divulge to Greenmoss the names of the persons who had received the report. D & B's so-called corrective notice was forthwith objected to by Greenmoss as absolutely inadequate and requests by Greenmoss for a more comprehensive retraction notice were refused. Thereafter, without any factual basis, D & B changed the credit rating which it had previously established for Greenmoss and engaged in other persistent activity which adversely reflected on Respondent's creditworthiness.

## 2. The Proceedings Below.

The posture of the parties in this case is that Greenmoss is a "private" plaintiff, that is, a purely private figure as opposed to a public figure or public official. The Defendant concedes it is a non-media defendant engaged in the business of commercial credit reporting and admits it is not a consumer reporting agency. The defamatory statements of the Petitioner did not involve an issue of public interest. Commercial private speech is involved rather than public speech.

Petitioner's Answer to the Complaint and Affirmative Defenses, filed some two and one-half years before trial, asserted no Constitutional argument in defense of its actions. Indeed, not until the morning the trial commenced did D & B assert that the First and Fourteenth Amendments to the U.S. Constitution had any application in this case or that *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), had any bearing on this litigation.

Prior to the jury's decision, Petitioner did not assert *Gertz* as an independent basis for protection. On the contrary, D & B took the position at the trial that, as a commercial credit reporting agency, it was entitled to the protection of a common law qualified privilege to defame. It was only in the context of the common law qualified privilege that D & B suggested the First and Fourteenth Amendment and *Gertz* had application to this litigation. Petitioner did not contend at the Trial Court level that it was entitled to *both* the protection of *Gertz* and the protection of the common law qualified privilege; it characterized *Gertz* as setting forth a standard that was coterminous with the common law qualified privilege.

Petitioner's requests to charge the jury, which the Trial Court adopted over the objection of Greenmoss, did not request a specific charge based on *Gertz*. D & B's requests were couched in the context of the qualified privilege existing at common law.

Subsequent to trial, Petitioner first asserted that the First and Fourteenth Amendments had independent application to this case and that *Gertz* should be extended to encompass non-media defendants.

In adopting D & B's requests for instructions to the jury, the Trial Court clearly and specifically negated any opportunity of Greenmoss to recover damages resulting from any presumption under defamation *per se* doctrines. The Court instructed the jury that a qualified privilege to defame protected D & B and that Greenmoss had the burden of proving the privilege was destroyed. The charge stated that:

The conduct which would destroy the qualified

privileges of a commercial credit agency *must be more than mere negligence or want of sound judgment. It must show malice or lack of good faith on the part of the defendant.* If you find that the Defendant acted in bad faith towards the Plaintiff in publishing the erroneous report or that the Defendant intended to injure the Plaintiff in its business or that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously and the privilege is destroyed. Further, if the report was made with reckless disregard of the possible consequences, or if it was made with the knowledge that it was false or with reckless disregard of its truth or falsity, it was made with malice. Plaintiff has the burden to persuade you by the preponderance of the evidence that the Defendant's conduct in this case amounted to malice as I have defined it. Respondent's Appendix A3. (Emphasis added.)

Significantly, Petitioner fails to point out to this Court that the Vermont Supreme Court specifically ruled that the charge not only afforded D & B the common law qualified privilege extended to credit reporting agencies but also gave it the benefits of the Constitutional privilege outlined in *Gertz*. The Vermont Supreme Court's decision states that:

[W]e have carefully reviewed the jury instructions and in addition to being properly charged in line with our common law rules as to liability and damages, Defendant (D & B) was afforded a common law qualified privilege against credit reporting agencies *along with the ill-charged Constitutional privilege outlined in Gertz. In short, Defendant has nothing*

*to complain about, since it received two beneficial charges to which it was not entitled.* Petitioner's Appendix A16 (emphasis added).

Accordingly, the Vermont Supreme Court has construed the instructions to the jury, *as a matter of fact and law*, to have included the *Gertz* standards. The Trial Court's instructions prevented Respondent from recovering any award of damages, either compensatory or punitive, unless the qualified privilege and the *Gertz* standard were satisfied.

#### **SUMMARY OF ARGUMENT**

The Vermont Supreme Court has ruled that the instructions to the jury were consistent with *Gertz*. Accordingly, the issue whether the First Amendment's limitations on damages for libel are applicable to non-media defendants in suits brought by purely private plaintiffs is not squarely before this Court since, as a pre-condition to considering this issue this Court must override the factual and legal conclusions of the Vermont Supreme Court.

Secondarily, this Court must determine whether the Petitioner appropriately presented the Trial Court with an opportunity to rule on the application of *Gertz* since *Gertz* was not presented as an independent basis for protection at the trial court level.

Thirdly, the issues in this case are of such minor significance in the overall structure of the law that their resolution by this Court is unnecessary. Accordingly, there is no substantial Federal question before this Court and there are no special or important reasons for the grant of Certiorari. As this Court has recognized, the entire law of defamation has not been preempted by federal Constitutional standards.

Fourthly, the result below was accurate, correct and the right result was reached. Finally, the result below was fair since Respondent won its case despite two jury instructions which heavily favored Petitioner including one which it erroneously contends was not given.

## REASONS FOR DENYING THE WRIT

### 1. The Questions Presented For Review Are Not Squarely Before The Court.

Petitioner suggests that the issue of First Amendment protection for a non-media defendant in a suit by a purely private plaintiff is clearly before the Court in this cause. In fact, that issue is not squarely before this Court because several crucial pre-conditions to its consideration, which pre-conditions are factual in nature, must be addressed and resolved favorably to Petitioner prior to consideration of any Constitutional issue.

The first and most apparent obstacle to consideration of any Constitutional question is one not mentioned by Petitioner, namely, the finding of fact and legal conclusion of the Vermont Supreme Court that the standards established in *Gertz* were afforded to Petitioner in the instructions to the jury. Although *Gertz* should not be extended to non-media defendants, the jury charge not only was consistent with *Gertz* but exceeded the *Gertz* standards. *Gertz* requires that fault be shown to justify compensatory damages but stops short of ruling that the *New York Times v. Sullivan* standard of malice applies to compensatory damages. See *New York Times v. Sullivan*, 376 U.S. 254 (1964). The trial court's charge required the jury to find that there was

malicious or reckless publication of the report before *any* damages, including compensatory damages, could be awarded. The trial court's methodology was to impose the *New York Times v. Sullivan* standard of knowledge of falsity or reckless disregard of truth or falsity as a prerequisite to recovery of any damages. This standard was instructed in connection with the quantum of proof necessary to overcome the qualified privilege at common law of a credit reporting agency which the trial court extended to D & B.

By making the *New York Times* standard of malice an essential ingredient of its charge on the question of the qualified privilege, the court thus proscribed any recovery whatsoever, including recovery of compensatory damages, unless Greenmoss proved that D & B's actions met the *New York Times* standard. This included any recovery under the theory of libel *per se*.

*Gertz* acknowledges that in order to recover actual or compensatory damages, a plaintiff need not satisfy the *New York Times* standard of Constitutional malice. Indeed, under *Gertz*, even a negligence standard is permissible. However, in order to recover presumed or punitive damages, the *New York Times* standard must be met. Thus, even if *Gertz* does apply, the charge, when read as a whole, clearly presented the jury with not only the ingredients necessary to satisfy the *Gertz* test, but in fact exceeded the standards required by *Gertz* since *no* liability could be found and no damages of any nature could be awarded without satisfying the *New York Times* standard.

In reviewing the jury instructions, the Vermont Supreme Court held that the jury was instructed in accordance with

the Constitutional privileges outlined in *Gertz*. The Court observed that Petitioner received the benefits of this charge even though it was not entitled to it.

Thus, the initial consideration here does not, as Petitioner contends, involve a Constitutional question, but rather, a factual inquiry, namely, whether the Vermont Supreme Court correctly concluded as a matter of fact that the trial court's charge included the *Gertz* requirements. To reach the questions urged by Petitioner, this Court must first resolve against the Vermont Supreme Court and in favor of Petitioner a question of fact which has been decided by the highest court of the State construing a jury charge delivered by one of its Trial Courts. In addition to being a factual conclusion, the ruling of the Vermont Supreme Court on this point constitutes a legal interpretation by the State's highest court of the impact and legal effect of the jury instructions taken as a whole. *Curtis Publishing v. Butts*, 388 U.S. 130 (1975), mandates that the impact of a jury instruction must not be ascertained by merely considering isolated statements but must take into consideration all of the instructions given and the tendency of the proof of the case. The Vermont Supreme Court has followed *Butts* in ruling that Petitioner received the benefits of the *Gertz* standards in the charge.

Accordingly, even if the extension of *Gertz* to non-media defendants in "private figure" cases raises a substantial constitutional question, this case is not an appropriate vehicle for the resolution of the issue.

**2. Petitioner Failed To Raise The Constitutional Questions In This Petition With Sufficient Clarity In The Proceedings Below.**

Another obstacle to utilization of this case for consideration of the extension of *Gertz* to private plaintiff-non-media defendant actions is that Petitioner did not present the trial court with a sufficient opportunity to rule upon the questions which are presented for review here.

Prior to the rendition of the verdict, Petitioner never claimed that it was entitled to the protections of *both Gertz* and the common law qualified privilege made available by some courts to commercial credit rating agencies. Petitioner's Answer and Affirmative Defenses submitted to the Lower Court in November, 1977, asserted only a qualified privilege granted to credit reporting agencies. No Constitutional defense was asserted before trial. On the day trial started, Petitioner submitted its requests to charge the jury, (Respondent's Appendix B1-4) together with a memorandum entitled "Defendant's Memorandum of Law Concerning Existence and Nature of Qualified Privilege" (Respondent's Appendix C1-6). Petitioner argued therein that, in addition to the common law, to which it devoted most of its attention, an additional basis for the existence of the qualified privilege was the First and Fourteenth Amendments to the United States Constitution. Petitioner's Memorandum on the Existence and Nature of the Qualified Privilege gave scant attention to *Gertz* and presented *Gertz* as a subset or function of the qualified privilege and not as an independent ground for protection against libel complaints.

Accordingly, this case was tried as a common law libel

case with the claim of a qualified defamation privilege of a credit reporting agency as a crucial defense and had no overtones of First Amendment protection. Significantly, the Court charged the qualified privilege virtually as requested by Petitioner. There was nothing to indicate to the trial court that Petitioner was requesting *Gertz* be extended to non-media defendants as an independent ground of defense. Petitioner never put the trial court on sufficient notice that it claimed a separate basis for absolution from liability grounded on the Constitution.

Respondent submits that the point which Petitioner now seeks to raise was not adequately presented to the trial court. The test is whether the trial court has been so alerted to the claimed defense that it had a fair opportunity to gauge its application and utilize it if appropriate. As a matter of State law, this issue has been forfeited consistent with the decisions of the Vermont Supreme Court concerning a party's responsibility to present its position to the trial court with sufficient clarity and precision. *See Scanlon v. Hopkins*, 128 Vt. 626, 270 A.2d 352 (1970); *Dodge v. McArthur*, 126 Vt. 81, 223 A.2d 453 (1966). The Constitutional issue asserted here does not rise to the level of the "glaring error" test which forgives a party from its advocacy responsibility. *State v. Stockwell*, 142 Vt. 232, \_\_\_A.2d\_\_\_ (1982); *State v. Towne*, 142 Vt. 241, \_\_\_A.2d\_\_\_ (1982).

**3. The Issues Presented Are Not Sufficiently Important To Warrant Review By This Court.**

Grant of a Writ of Certiorari requires the exercise of this Court's extraordinary and discretionary jurisdiction. This case is simply of insufficient importance in the overall

structure of the law to merit resolution by the Court at this time. This case does not involve issues of major public import. Insofar as the law of libel is concerned, *Greenmoss* is neither a public official nor a public figure and D & B is, by its own admission, a non-media defendant and is not a consumer reporting agency. The content of the Petitioner's "speech" is clearly not public speech but rather is exclusively private, commercial speech.

Mercantile credit reports have generally been treated as private commercial expressions. As such, they are entitled to lesser protection than other Constitutionally guaranteed expressions. *Central Hudson Gas and Electric Company v. Public Service Commission*, 447 U.S. 557, 562-63 (1980); *Pittsburgh Press Company v. Human Relations Commission*, 413 U.S. 376, 384 (1972).

The issue sought to be reviewed is not whether *Gertz applies* to purely private plaintiffs and non-media defendants who are involved in defamation litigation, but rather, whether *Gertz* should be *extended* to defamation actions involving such parties. *Gertz* makes clear that the law of defamation is not to be solely decided by federal Constitutional standards. Indeed, in *Miskovsky v. Oklahoma Publishing Company*, \_\_\_U.S.\_ (no. 81-2407) (denying cert.), Mr. Justice Rehnquist observed that the entire law of defamation has not been preempted by federal Constitutional standards.

It does not help Petitioner to contend that the narrow issue in this case has not been resolved by this Court. There is no valid reason why the matter should be resolved by this Court. The fact that a given question has not been addressed has never been a recognized basis for the granting of Certiorari.

In two cases presented to the Court in the 1982 term, issues virtually identical to that submitted by this Petitioner were presented and Certiorari was denied. *Williams v. Pasma*, \_\_\_Mont.\_\_, 656 P.2d 212, cert. denied \_\_\_U.S.\_\_ (1983) (no. 82-1640); *Mertz v. Denny*, 106 Wisc.2d 636, 318 N.W.2d 141, cert. denied, \_\_\_U.S.\_\_ (1982) (no. 81-2376). The issue presented by Petitioner is a narrow issue, not broad enough to warrant review by this Court. The issue does not involve the press and does not involve the institution of the freedom of the press. It does not involve public figures or public officials. The facts of the case are not of public concern nor are they of national or intense local concern. This is simply dispute resolution between two private parties which involves a minute thread of the fabric of defamation law. No compelling reason exists for the exercise of this Court's energies to explore such an arcane area.

The scenario Petitioner portrays is that there is considerable disarray in the State and lower Federal Courts concerning the questions presented for review. However, a comparison of the issues in the cases cited by Petitioner with the questions in this Petition dramatically minimizes the claims of conflict. It is important to recognize that this case presents a purely private plaintiff and a non-media defendant which is not a consumer reporting agency. In addition, the defamation was not over an issue of public concern.

Petitioner cites *Avins v. White*, 627 F.2d 637 (3rd Cir.), cert. denied, 449 U.S. 982 (1980) in support of its position. However, *Avins* involved a plaintiff who was a public figure suing a private individual and the matter involved an issue

of serious public importance. The Court of Appeals for the Third Circuit specifically stated that it was *not* deciding whether the *New York Times* privilege extends to all private individual defendants regardless of the context and took pains to distinguish its result from its previous decision in *Grove v. Dun & Bradstreet, Inc.*, 438 F.2d 433 (3rd Cir.), cert. denied, 404 U.S. 898 (1971) in which it was held that the *New York Times* standard does not apply to disseminations made by a private credit reporting agency.

Similarly, *Davis v. Schuchat*, 510 F.2d 731 (D.C. Cir. 1975), also relied upon by Petitioner, is a case involving a plaintiff who was a public figure and a defendant who, although being a "private" defendant, was also a newspaper reporter who made defamatory statements to a number of people in the course of his preparation for a news story involving a matter of public concern. The Court in *Davis* does not specifically hold *Gertz* applicable to non-media defendants. The Court's ruling turned on plaintiff's status as a public official.

*Woy v. Turner*, 533 F. Supp. 102 (N.D. Ga. 1981) involved a plaintiff who was a public figure. The Court's focus in *Turner* was whether the plaintiff was a public figure, not whether *Gertz* applied to a non-media defendant.

The same analysis was utilized in *Bussie v. Larson*, 501 F.Supp. 1107 (M.D. La. 1980) in which the holding was specifically limited to defamation cases involving a public official or public figures. Interestingly, *Bussie* took pains to distinguish *Grove v. Dun & Bradstreet, Inc.*, *supra*.

Throughout this litigation, Petitioner has placed extraordinary reliance upon *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976). *Jacron* acknowledges

that the opinion in *Gertz* does not apply to non-media defendants. Curiously, however, *Jacron* relies upon the now rejected plurality theory of *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) to support its position. Finally, *Jacron* applied the *New York Times* standard to a non-media defendant solely as a matter of Maryland state law and "wholly apart from any possible Supreme Court holding in the future based on Constitutional grounds." *See Jacron Sales Co. v. Sindorf*, 350 A.2d at 695-96. The Oregon Supreme Court in *Harley-Davidson Motorsports, Inc. v. Markley*, 279 Or. 361, 568 P.2d 1359 (Or. 1977) characterizes *Jacron* as a "most peculiarly reasoned case."

Decisions adjusting the rights of public figures and public officials as plaintiffs are totally inapposite to this case and it is fruitless to lump them together since different Constitutional considerations apply to public figures and public officials as plaintiffs in libel actions. *See Eaton, The American Law of Defamation through Gertz v. Robert Welch, Inc., and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349, 1419 (1975).

It has been suggested that, since *Gertz*, this court has consistently denied Certiorari or summarily dismissed appeals in defamation cases which could have served as vehicles for clarifying unresolved or questionable doctrinal issues. This has led some commentators to conclude that this Court, recognizing that all issues of defamation law do not have to be resolved with exclusive reference to federal Constitutional standards, has, consistent with its statements in *Gertz*, permitted the states to develop substantive defamation law. *See Frakt, Defamation Since Gertz v. Robert Welch, Inc.: The Emerging Common Law*, Rutgers-Camden Journal, 519, 520-22 (1979).

#### 4. The Decision Below Gave Full Consideration To the Issues and Decided Them Correctly.

It seems clear that *Gertz* is exclusively a media decision. The repeated emphasis to the "media," "the press," "broadcasters," the "communications media," and the like leave no ambiguity as to whether the rules fashioned in *Gertz* were meant to extend beyond the press. They simply were not. *See Eaton, supra* at 1417. Indeed, it has been posited by Mr. Justice Stewart that *New York Times* and its progeny, including *Gertz*, do not suggest that the Constitutional theory of free speech gives an individual any immunity from liability for libel or slander. Instead, Mr. Justice Stewart has observed that *New York Times* and succeeding cases have nothing to do with freedom of speech but rather advance freedom of the press theorems solely. *See Stewart, Or Of The Press*, 26 Hastings L.J. 631, 635 (1975). Accordingly, Respondent submits that *Gertz* does not turn on free speech theory and rather is described more properly as a freedom of the press case. Its principles are therefore applicable only to the media. *See Shiffrin, Defamatory Non-Media Speech and First Amendment Methodology*, 25 U.C.L.A. L. Rev. 915, 916, 930 (1978). Thus considered, *Gertz* has no application whatsoever to the instant litigation.

Even if free speech is involved in these cases, the Vermont Supreme Court correctly recognized that a balancing test between the legitimate rights of a defamed plaintiff and the Constitutional interest which may be threatened if the defendant is held financially accountable for its actions must be utilized in applying First Amendment protections in defamation cases. The Court

properly recognized that in private plaintiff-non-media defamation actions, the crucial elements which have brought the First Amendment into the field of defamation law are missing. In non-media defamation, there is no threat to the free and robust debate of public issues. There is no potential interference with meaningful dialogue of ideas concerning self-government and there is no threat of liability causing a reaction of self-censorship by the press. As *Gertz* itself recognizes, "Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust and wide-open debate on public issues. ' " *Gertz v. Robert Welch, Inc.*, *supra*, 418 U.S. at 340 (quoting *New York Times v. Sullivan*, *supra*, 376 U.S. at 270).

In the same paragraph in which this Court announced its holding in *Gertz*, it stated, "It (the holding) recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, it shields the press and broadcast media from the rigors of strict liability for defamation." 418 U.S. at 348. To provide a commercial business such as Dun & Bradstreet, which scrupulously limits who receive its commercial messages, with all the privileges available under the *New York Times* standard as well as the privileges which may be available to it at common law, would be a socially undesirable result at odds with the balancing test employed by the Court in *Gertz*. Uniformity has never been the blind quest of the law, yet Petitioner's essential argument here seeks to have the bland brush of symmetry render opaque the subtle factors which go into the Constitutional balance.

Petitioner's business involves very limited access publications. They are not designated to provide information on a general basis to the public at large.

Indeed, their purpose is to the contrary and is opposed to the *New York Times* rationale of free and uninhibited debate since their use is conditional upon maintaining confidentiality.<sup>1</sup>

When viewed from the Defendant's perspective, there is a clear distinction between a publication which disseminates news for public consumption and one which provides specialized information to a selective, finite audience. Furthermore, Petitioner controls its audience and the scope of its publications in advance of the publication. Thus, no difficulty exists in distinguishing between media and non-media defendants on the facts of this case.

*Gertz* emphasizes the legitimate interests that states have in protecting private individuals from defamation. This has been a long-standing and clearly settled doctrine in Vermont. See *Darling v. Clement*, 69 Vt. 292, 300, 37 A. 779, 781 (1897); *Michlin v. Roberts*, 132 Vt. 154, 318 A.2d 163 (1974); *Lancour v. Herald and Globe Association*, 112 Vt. 471, 28 A.2d 396 (1942). With media defendants, a private individual's right to recover for libel has been made more difficult because his interests have been outweighed by important constitutional issues. It does not follow that where those constitutional values are not involved recovery should face the same obstacles. Arguments based on simplicity and homogeneity have no place in the balancing test this Court has mandated for assessing the role of the First Amendment in defamation cases.

Simply stated, when the competing interests are placed on the scale, the strong and legitimate state policy of protecting individual reputations, which the Vermont Courts have long recognized, makes downweight and fully justifies

<sup>1</sup>See e.g., The conditions for use appearing at the bottom of Petitioner's Appendices E and F.

the decision below. The reputational interest, when considered against the interest of this Petitioner, properly and correctly inclines the scales to the conclusion reached by the Vermont Supreme Court. Indeed, Respondent submits that none of the factors which this Court utilized in applying First Amendment protections in *Gertz* are, when properly considered, available to this Petitioner. This Petitioner had a self-regulating mechanism to limit possible damage to reputations in the form of its pre-publication verification policy which it failed to utilize in this case. Moreover, this Petitioner, by virtue of its subscription system, has much greater flexibility in choosing how broad or limited a forum to use in its communications; it can and does direct its information to a select few whom it knows about in advance. These considerations are totally different than those which arise when media speakers such as the press and broadcast media are involved.

#### **5. The Correct Result Was Reached By The Court Below.**

Even if the principles set forth in *Gertz* should be extended to a purely private plaintiff against a non-media defendant, it is submitted that the result below is entirely correct. As respects compensatory damages, *Gertz* merely requires that states do not impose liability without fault. In media cases after *Gertz*, most states have employed a negligence standard. Indeed, the *Gertz* decision seems to have anticipated that a negligence standard would be utilized for media defendants. See *Denny v. Mertz*, 106 Wisc.2d 836,

318 N.W.2d 141, *cert. denied*, \_\_\_U.S.\_, 103 S.Ct. 179 (1982) and cases cited therein.

In this cause, the trial court, despite its statement that Petitioner's publication constituted *libel per se*, prohibited the jury from awarding any damages, either compensatory or punitive, unless serious fault was shown. The fault required in the charge went well beyond negligence. Thus, to return its verdict, the jury must have found that Petitioner's actions constituted far more than merely negligence. The jury's findings that punitive damages were justified based on an instruction clearly consistent with *Gertz* leads to the conclusion that the jury was convinced Petitioner's actions constituted reckless disregard for the truth or falsity of the matter. Beyond that, Petitioner's opening statements to the jury and its briefs to the Vermont Supreme Court admitted it was negligent in connection with the publication of the report. Irrespective of Petitioner's concession of negligence, the evidence in this case is overwhelming that its conduct constituted, at the very minimum, negligence. Since negligence is a satisfactory standard to be adopted in determining compensatory damages under *Gertz*, Petitioner was clearly negligent and no retrial of this matter is necessary to establish such negligence.

As respects punitive damages, the Court charged that in order to get to the question, the jury must find actual malice, malice being defined with reference to the *New York Times* standard, must be proved by a clear preponderance of the evidence. This was clearly correct. Thus, even if *Gertz* were to extend to this action, the only modification in the charge would be that Greenmoss would have to prove negligence to support its compensatory damage verdict. Negligence abundantly exists here and has been admitted by Petitioner.

Therefore, the result below is correct. A restructuring of this case is unfair to Respondent, will not assist Petitioner and is a gesture of symbolism only.

**6. A Fair And Appropriate Result  
Was Reached Below.**

In this cause, the trial court instructed the jury in a manner consistent with *Gertz* as the Vermont Supreme Court held. In addition, it charged that, as a credit reporting agency, Petitioner enjoyed a common law qualified privilege to defame. This was an open question in Vermont at the time. Not only did the trial court instruct as to the existence of a common law privilege, but, in adopting Petitioner's request to charge on the scope of the privilege, delivered an instruction that strongly favored the Petitioner and highly disadvantaged the Respondent. Of the cases construing the credit reporting agency privilege in other jurisdictions, the lower court selected a standard that was the most favorable to Petitioner of all the decided cases. *See, e.g., Restatement, (Second) Torts* §595. Despite this rather Draconian charge, Respondent prevailed.

The Vermont Supreme Court ruled, solely as a matter of state common law, that a credit reporting agency does not have a qualified privilege to defame and therefore, D & B received at least two jury instructions to which it was not entitled. Although Petitioner has, appropriately, not asserted the ruling of the Vermont Supreme Court concerning the common law privilege as a question for review here, the trial court's inclusion of that instruction and the jury's subsequent verdict despite the instruction, demonstrate that the result below is fair and appropriate

considering the facts of this case. It also demonstrates that the application of *Gertz* to this case would not benefit the Petitioner in any consequential respect. Under the trial court's charge, Respondent had to show malice to recover any verdict whatsoever. Thus, the Petitioner was, at the trial level, afforded even more protection than it now claims it was deprived of.

## CONCLUSION

This case does not present an appropriate vehicle for the resolution of the questions urged by Petitioner. Moreover, those questions are not significant or important and, in view of the facts in this case, are at best artificial and hypothetical. The petition ignores that a jury charge more stringent than *Gertz* mandates was in fact delivered to the jury.

Petitioner makes this case out to be more than it actually is and seeks to exalt uniformity over logic which is inimical to the balancing methodology employed in First Amendment defamation litigation. Lastly, Petitioner cannot show that any different outcome would have occurred in the proceedings below. For all of the foregoing reasons, the Petition for Certiorari should be denied in its entirety.

Respectfully submitted,

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*Counsel for Respondent*

## APPENDIX A

SUPERIOR COURT	WASHINGTON COUNTY	MARCH TERM
GREENMOSS BUILDERS	*	
vs.	*	DOCKET NO. S326-77Wnc
DUN & BRADSTREET	*	

## JURY CHARGE

\* \* \* \*

Now in this case I'm going to discuss with you the defamation aspects of it and the damage questions that may be related to it. The Plaintiff, as you know, Greenmoss Builders, Inc. has filed suit seeking compensatory and punitive damages on account of an alleged libel and defamation in the form of a Report issued by Dun & Bradstreet on July 26, 1976 in which it was erroneously reported that the Plaintiff had filed for bankruptcy. A libel is a false and defamatory statement negligently or recklessly published of and concerning the Plaintiff which tends to injure its reputation in the eyes of a substantial, respectable group, even though they are a minority of the total community, or of the Plaintiff's associates. A corporation is deemed a person under our law, and like a person, a corporation may be the subject of a libel. The Defendant in this case has conceded that the report of Plaintiff's bankruptcy was false and erroneous; that the Report was published to others by the Defendant is also uncontested. Words which tend to injure the Plaintiff in

its occupation, or proof such as words which tend to impute the insolvency of a business, are libelous per se. This means that the Plaintiff does not need to prove actual damages resulting from the libel since damage and loss is conclusively presumed. In the present case, I instruct you that the Defendant's Erroneous Report of the Plaintiff's bankruptcy constitutes libel as a matter of law unless you find that the Defendant was privileged to make that Report and publish it to subscribers. Under the law, a commercial credit rating agency enjoys a qualified privilege in making reports to its subscribers. This means that a commercial credit rating agency cannot be held accountable for erroneous statements which are merely negligent. This is because commercial rating agencies are deemed to serve a legitimate business need which might not be met in the absence of the privilege. The Defendant has the burden of proving that it is a commercial credit rating agency, and I don't think there's any dispute about that in this case. If you determine that the Defendant is a commercial credit rating agency, the qualified privilege will apply; however, this is but a qualified privilege. If a commercial credit rating agency publishes an Erroneous Report to customers other than those who had recently requested credit information regarding the subject of a report, the agency has abused the privilege and may be held liable. In addition, if an Erroneous Credit Report is maliciously or recklessly made by a commercial rating agency, the agency is not entitled to the protection of that privilege. So in terms of the case before you, if you determine that the Defendant is ordinarily covered by the qualified privilege you must then determine whether that privilege has been abused, either by excessive publication to customers who have not requested credit

information regarding the Plaintiff, or by malicious or reckless publication of the report. The Plaintiff has the burden of proving that the privilege has been destroyed. The conduct which would destroy the qualified privileges of a commercial credit agency must be more than mere negligence or want of sound judgment. It must show malice or lack of good faith on the part of the Defendant. If you find that the Defendant acted in a bad faith towards the Plaintiff in publishing the Erroneous Report, or that Defendant intended to injure the Plaintiff in its business, or that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously and the privilege is destroyed. Further, if the Report was made with reckless disregard of the possible consequence, or if it was made with the knowledge that it was false or with reckless disregard of its truth or falsity, it was made with malice. Plaintiff has the burden to persuade you by the preponderance of the evidence that the Defendant's conduct in this case amounted to malice as I have defined it.

Now if you determine that the Defendant is not entitled to the benefits of a qualified privilege, you must then consider the question of damages; where, as in this case there is a libel per se, damages are presumed and actual damages may not be proven, you must determine the amount of compensatory damages to be awarded. In determining the amount of compensatory damages to award, you may consider such items as lost profits and expenditures proximately caused by any wrong doing on the part of the Defendant. Although the law presumes damages in some amount in a case of libel per se and therefore relieves the Plaintiff of the burden of establishing by specific proof that

damages have occurred, the law does not compel you to return a verdict of substantial damages unless you are persuaded by a preponderance of the evidence that substantial damages have in fact occurred. It is proper, if, in your judgement you deem it to be correct, even in a case of libel per se, for you to return a verdict of nominal damages such as One Dollar, or damages in such other amount as you feel is fair and just compensation to the Plaintiff for the damages *actually* caused by the Defendant.

Now a word or two about punitive damages. If you find that Defendant's conduct was not *privileged*, and if you also find, on the basis of *clear and convincing evidence*, that the Defendant acted with *actual malice* in publishing the article in question, then you may award Plaintiff punitive or exemplary damages in addition to the *actual* damages assessed.

## APPENDIX B

STATE OF VERMONT	)	WASHINGTON SUPERIOR COURT
	:SS.	
COUNTY OF WASHINGTON )		Docket No. S-326-77 WnC
	)	
GREENMOSS BUILDERS, INC. )	)	
	)	
v. )	)	
	)	
DUN & BRADSTREET, INC. )	)	

## DEFENDANT'S REQUESTS TO CHARGE JURY

NOW COMES DUN & BRADSTREET, INC., defendant in the above-captioned action, by and through its attorneys, Young & Monte, and requests pursuant to Rule 51(b) the following charges to the jury:

1. You may not return a verdict against the defendant merely because defendant published an erroneous report of plaintiff's bankruptcy if you find that the circumstances of this publication were such that a qualified privilege exists. Thee law requires that you must extend a qualified privilege to the defendant if you believe that the defendant has proved by a preponderance of the evidence that it is a commercial credit reporting agency and that defendant furnished the erroneous report only to its customers who had requested credit information concerning the plaintiff. If you determine that a qualified privilege should be applied in this case by application the foregoing rule, then you may find for the plaintiff and against the defendant in any amount only if you believe that the plaintiff has proved by a preponderance of the evidence that the

defendant exceeded its privilege by acting with malice when it published the erroneous report. If you determine that this qualified privilege should apply, then you must return a verdict for the defendant unless you believe that the facts, as proved, establish malice.

2. The word "malice" has a specific legal meaning in this context. More than mere negligence or want of sound judgment and more than hasty or mistaken action is required to establish malice. In this context, "malice" means the intentional doing of a wrongful act without just cause or excuse. *Nott v. Stoddard*, 38 Vt. 25, 32 (1865), *Hedman v. Siegriest*, 127 Vt. 291, 294 (1968), *Partridge v. Cole*, 96 Vt. 281, 285 (1923), *Judd v. Chaloux*, 114 Vt. 1, 4 (1944). Plaintiff has the burden to persuade you by a preponderance of evidence that the defendant's conduct in this case amounted to malice as I have defined it.

3. (Defendant requests the following charge if the Court charges the jury to the effect that actual damages need not be specifically proven in a case of libel *per se*, but not otherwise:)

Although the law presumes damage in some amount in a case of libel *per se*, and therefore relieves the plaintiff of the burden of establishing by specific proof that damages have occurred, [the law does not compel you to return a verdict of substantial damages unless you are persuaded by a preponderance of the evidence that substantial damages have, in fact, occurred.] It is proper, if in your judgment you deem it to be correct, even in a case of libel *per se* for you to return a verdict of only nominal damages, such as One Dollar, or damages in such other amount as you feel is fair and just compensation to the

plaintiff for the damages actually caused by the defendant.

4. Any award of damages which you may make to the plaintiff in this case must be limited to damages suffered by the corporate plaintiff itself and your award may not reflect any damages which you may believe were suffered by anyone other than the plaintiff corporation, including the individuals who may be officers, shareholders, or otherwise connected with the corporate plaintiff.

5. In defamation actions, the law requires that you consider whether the defendant has taken any steps to mitigate any damages which the plaintiff may have sustained.

6. Mitigation of damages is action taken by the defendant to lessen the extent of severity of the injury sustained by the plaintiff because of the defendant's conduct. 50 Am Jur 2d, *Libel and Slander*, § 375.

7. If you find that the defendant took steps such as notifying the persons to whom it published the erroneous report of bankruptcy to the effect that that report was in error, apologized to plaintiff, or otherwise made an effort to lessen the extent or severity of plaintiff's damages, then you must take this mitigating conduct of the defendant into account in determining the amount of damages, and you must lessen your award of damages to the extent that you believe is appropriate in all of the circumstances.

DATED at the Town of Northfield, County of Washington, and State of Vermont this 7th day of April, 1980.

DUN & BRADSTREET

By Its Attorneys  
YOUNG & MONTE

By \_\_\_\_\_  
Peter J. Monte

cc: Thomas L. Heilmann, Esq.

**APPENDIX C**

STATE OF VERMONT ) WASHINGTON SUPERIOR COURT  
:SS.  
COUNTY OF WASHINGTON ) Docket No. S-326-77 WnC

GREENMOSS BUILDERS, INC. )  
 )  
 v. )  
 )  
 DUN & BRADSTREET, INC. )

**DEFENDANTS MEMORANDUM OF LAW CONCERNING  
EXISTENCE AND NATURE OF QUALIFIED PRIVILEGE**

THIS ACTION was brought by Greenmoss Builders, Inc. against Dun & Bradstreet, Inc., for damages from an alleged defamation of the plaintiff by the defendant. The defamation complained of was a report by Dun & Bradstreet, Inc., on or about July 26, 1976, to the effect that the plaintiff was bankrupt and which included an allegedly erroneous statement of the plaintiff's assets and liabilities. Defendant admits that its July 26, 1976, report concerning the plaintiff erroneously attributed bankruptcy to the plaintiff and understated plaintiff's assets and liabilities.

Defendant does not concede, however, that this erroneous publication establishes its liability in this matter. Defendant submits that there is a qualified privilege extended to it as a commercial credit reporting agency and that because defendant has not abused this privilege, it is not liable to plaintiff on the complaint. The purpose of this memorandum is to state the defendant's authority and argument regarding the existence of this privilege and its position that defendant has not in this case exceeded the privilege.

## EXISTENCE OF QUALIFIED PRIVILEGE

The Vermont Supreme Court has not been called upon to rule directly on the question of whether or not a qualified privilege is extended in defamation actions such as the one at bar. The overwhelming weight of authority in other jurisdictions, however, extends a qualified privilege in defamation actions to merchantile or credit reporting agencies. In fact, defendant is aware of only two states which deny this qualified privilege. In Georgia, conditional privileges are statutorily defined, *Johnson v. Bradstreet Co.*, 77 Ga. 172 (1886); and, in Idaho, the courts have not addressed the question since 1914, *Pacific Packing Co. v. Bradstreet Co.*, 25 Idaho 696, 139 P. 1007 (1914).

The qualified privilege which is a part of the common law of most jurisdictions may be stated as follows: A qualified privilege exists which insulates a commercial credit reporting agency from liability for otherwise defamatory statements if the statement is made by the credit reporting agency in confidence and in good faith to its customers which have requested the information and have a legitimate business interest in the information. See e.g., *Kansas Electric Supply Co. v. Dun & Bradstreet, Inc.*, (CA 10 Kan.) 448 F.2d 647, cert. den. 405 U.S. 1026; *Petition of Retailers Commercial Agency, Inc.*, 343 Mass. 515, 174 N.E. 2d 376; *H.E. Crawford Co. v. Dun & Bradstreet, Inc.* 241 F.2d 387 (4th cert. 1957); *Ford Motor Credit Co. v. Holland*, 367 A.2d 1311; *O'Neill v. Dun & Bradstreet, Inc.*, 456 S.W. 2d 96 (1970 Tex); *Roemer v. Retail Credit Co.*, (1970) 3 Cal App 3d, 83 Cal Rptr 540, Restatement (Second) Torts, Scope note preceding § 393 (1977); 40 ALR 3d 1049 at seq.,

30 ALR 2d 770, 776; 15 Am Jur 2d, *Collections and Credit Agencies*, §§ 26, 27.

Although the Vermont Supreme Court has never decided a case which called into issue the specific privilege which is the subject of this memorandum, the Vermont law clearly recognizes the principles and considerations which underlie the cases in other jurisdictions establishing the qualified privilege in question. In *Nott v. Stoddard*, 38 Vt. 25, 32 (1865), a defamation action, the Vermont Supreme Court stated:

[W]hen the words are defamatory, the law infers malice and a question of malice is not submitted to the jury except upon the question of damages, unless the occasion of speaking the words is such as to rebut that inference and render the speaking *prima facia* excusable; in which case the *plaintiff cannot recover unless there is malice in fact*. Cases of giving the character of servants, confidential advice for some legitimate purpose, communications to persons who ask for information and have a right or interest to know, are of this character...These cases are an exception to the general rule that malice be presumed as a matter of law. (Emphasis added)

Thus has the Vermont Supreme Court recognized the common law rationale which underlies the existence of the qualified privilege. That rationale is that public policy fosters the exchange of necessary information without strict liability for errors made in good faith when there is an important public purpose being served by the disclosure of the information. Vermont specifically recognizes confidential advice for a legitimate purpose in communications to persons who have asked for information and have a right

or interest to know the information as falling within the area protected by this public policy.

The case at bar illustrates the wisdom of this public policy. Our economic system is dependent upon the availability of credit which, in turn, depends upon a lender obtaining information about the borrower so that an informed decision about the prospects of repayment can be made before credit is extended. A lender cannot be left to rely solely on information provided by the borrower and must obtain information from other sources less subject to bias. It is obviously unrealistic to expect that a free flow of essential information would exist if strict liability were imposed on all persons who respond in good faith to a credit inquiry. In order, therefore, to encourage the good faith exchange of information for legitimate purposes, a *qualified* privilege was crafted by the courts at common law. This qualified privilege is not a license because, if abused, the privilege is lost.

There is a second rationale which underlies some court's decisions in favor of the creation of this qualified privilege. This second rationale is that the First and Fourteenth Amendments of the United States Constitution apply to actions for defamation, even those involving non-media defendants. See e.g., *Marchesi v. Franchino*, 387 A.2d 1129 (1978); *Jacron Sales Co., Inc. v. Sindorf*, 276 Md. 58, 350 A.2d 688 (1976); *Millsaps v. Bankers Life Company*, 35 Ill App. 3d 735, 342 N.E. 2d 329 (1976); Restatement (Second) Torts § 580 B. See also, *The Supreme Court*, 1973 Term, 88 Harv. L. Rev. 41, 148, n. 52 (1974). These authorities conclude that it would violate the provisions of the First and Fourteenth Amendments of the United States

Constitution to impose strict liability for defamation.

These authorities extend the rationale of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) beyond defamatory utterances published by communications media. The rationale of this extension is recited by The Restatement (Second) Torts § 580 B, comment (e), as follows:

As the Supreme Court declares, the protection of the First Amendment extends to freedom of speech as well as to freedom of the press, and the interests which must be balanced to obtain a proper accommodation are similar. It would seem strange to hold that the press, composed of professionals and causing much greater damage because of the wider distribution of the communication, can constitutionally be held liable only for negligence, but that a private person, engaged in a casual private conversation with a single person, can be held liable at his peril if the statement turns out to be false, without any regard to his lack of fault.

....There is little reason to conclude that the states would now be disposed to take the traditional strict liability approach for libel actions against the communications media, which has now been declared unconstitutional, and apply it to slander actions against private individuals, where it has not previously been significant.

For views and substantial accord with this rationale, see *The Supreme Court*, 1973 Term, 88 Harv. L. Rev. 41, 148 n. 52 (1974); Anderson, *Libel and Slander, Press Self-Censorship*, 53 Tex. L. Rev. at 442.

C-6

\*\*\*\*

DATED at the Town of Northfield, County of Washington, and State of Vermont this 7th day of April, 1980.

DUN & BRADSTREET, INC.

By Its Attorneys  
YOUNG & MONTE

By \_\_\_\_\_  
Peter J. Monte

By \_\_\_\_\_  
Brian R. Lyford

(3)

Office Supreme Court, U.S.  
FILED

DEC 22 1983

ALEXANDER L. STEVENS,  
CLERK

**No. 83-18**

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**IN THE**

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1983**

**DUN & BRADSTREET, INC.,**  
*Petitioner,*

v.

**GREENMOSS BUILDERS, INC.,**  
*Respondent.*

On Writ of Certiorari to the  
Supreme Court of the State of Vermont

**BRIEF OF PETITIONER**

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## **QUESTIONS PRESENTED FOR REVIEW**

The issue presented in this case is whether the First Amendment's limitations on the award of presumed and punitive damages for libel, recognized in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), apply to "non-media" defendants. The questions presented for review are:

- I. Do the First and Fourteenth Amendments to the Constitution permit private plaintiffs to recover presumed compensatory damages or "general" damages for libel against a "non-media" defendant absent a showing of "actual malice"?**
- II. Do the First and Fourteenth Amendments to the Constitution permit private plaintiffs to recover punitive damages for libel against "non-media" defendants under a standard of liability less demanding than the "actual malice" standard of *New York Times v. Sullivan*?**
- III. Did the trial court's instructions on presumed and punitive damages in this libel action violate the First and Fourteenth Amendments?**

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## **OPINIONS BELOW**

The order and opinion of the Supreme Court of the State of Vermont is not yet officially reported. It is reported unofficially at 461 A. 2d 414 (1983), reprinted in the Joint Appendix at 31-46.

The order of the Superior Court of Washington County, Vermont granting Dun & Bradstreet, Inc.'s motion for new trial is unreported. It is reprinted in the Joint Appendix at 25-27.

## **GROUNDS ON WHICH THIS COURT'S JURISDICTION IS INVOKED**

Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1257(3) (1976). The order and opinion to be reviewed was dated and entered by the Supreme Court of Vermont on April 15, 1983. On July 8, 1983, and within the time specified under 28 U.S.C. § 2101(c) (1976), Petitioner filed its petition for a writ of certiorari. By order of November 7, 1983, this Court granted the petition.

## **CONSTITUTIONAL PROVISIONS INVOLVED**

U.S. Const. amend. I, which provides in pertinent part:

Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

U.S. Const. amend. XIV, § 1, cl. 2:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

This is a libel action brought by Greenmoss Builders, Inc. ("Greenmoss") against Dun & Bradstreet, Inc. ("D&B").<sup>1</sup> Petitioner herein, a publisher of financial reports.<sup>2</sup> The action was brought in the state courts of Vermont and was tried before a jury. The jury returned a verdict for Greenmoss in the amount of \$50,000.00 compensatory damages and \$300,000.00 punitive damages.

### 1. The Facts

D&B publishes financial and related information concerning businesses to its subscribers. As part of a continuous service, D&B publishes "Special Notices" to subscribers interested in a particular business. On July 26, 1976, D&B reported in a Special Notice (J.A. 13) to five of its subscribers that Greenmoss had filed a voluntary petition in bankruptcy.<sup>3</sup> None of the five subscribers was a customer of Greenmoss.

<sup>1</sup> Dun & Bradstreet, Inc. is a wholly owned subsidiary of The Dun & Bradstreet Corporation. The non-wholly owned subsidiaries of The Dun & Bradstreet Corporation are Donnelly & Gerrardi Verwaltungs-GmbH., Donnelley & Gerrardi GmbH. & Co. K.G., Dun & Bradstreet S.L., and Dun & Bradstreet A.G. Affiliates of Dun & Bradstreet International, Ltd., a wholly owned subsidiary of The Dun & Bradstreet Corporation, are: Thomson Directories Ltd., Thomson Directories, Thomson Sales & Service Ltd., DBH Wirtschaftsdatenbank GmbH., Dun & Bradstreet (HK) Limited, and Telemarketing Italia S.p.A.

<sup>2</sup> D&B publishes financial and other information concerning businesses. It is not a consumer reporting agency.

<sup>3</sup> If a D&B subscriber has received information on a particular business within twelve months of the issuance of a Special Notice, that subscriber will automatically receive the Special Notice. Here, the Special Notice concerning Greenmoss was sent to the

On August 3, 1976, eight days after the publication of the Special Notice, Greenmoss' president, John Flanagan, contacted D&B's regional office in Manchester, New Hampshire, and advised D&B that the Special Notice was in error. On that same day, D&B issued a retraction in the form of a "Correction Notice" (J.A. 15) explaining the error and advising that the bankruptcy petition had been filed by an employee of Greenmoss, and not Greenmoss itself. D&B sent the Correction Notice to each of the five subscribers who had received the original Special Notice.

### 2. The Proceedings Below

The complaint<sup>4</sup> alleged that D&B erroneously reported that Greenmoss had filed a voluntary petition in bankruptcy and that the Special Notice "grossly misrepresented the assets and liabilities of the corporation . . . ." Greenmoss claimed that it had suffered damages, humiliation, injury and loss to its business reputation and standing in the community. Its complaint demanded \$7,500.00 in compensatory damages and \$15,000.00 in punitive damages. (J.A. 5-7)

At trial, Greenmoss introduced the deposition testimony of Julie Mullen, the employee of D&B who customarily reviewed bankruptcy petitions in Vermont.

Howard Bank, American Express Company, State Mutual Insurance Company, Goodyear Tire and Rubber Company, and Aetna Insurance Company.

<sup>4</sup> The complaint was originally filed on behalf of Greenmoss and its president, Mr. Flanagan. Plaintiffs made identical allegations and sought identical damages. By order dated January 23, 1980, the trial court granted D&B's motion to dismiss Mr. Flanagan as a party plaintiff. (J.A. 1)

(Tr. 287-326)\* Ms. Mullen's apparent misreading of the Greenmoss employee's petition had caused the erroneous Special Notice to be issued. There is *no evidence* in Ms. Mullen's testimony or in any other part of the record that D&B published the Special Notice with reckless disregard for the truth or with actual knowledge of falsity. Her good faith was never questioned.

Greenmoss did not offer testimony from any of the five subscribers or from any other disinterested person to prove that the publication of the Special Notice caused damage. The company's sole evidence on damages and injury was the testimony of its former president, John Flanagan, who had a pecuniary interest in the outcome of the case. Mr. Flanagan conceded that the company's most profitable year was the year that followed D&B's erroneous report. (Tr. 143) Nevertheless, he speculated that although the company's sales and profits had increased after the Special Notice, they had fallen short of expectations. He also estimated that the company had incurred expenses of \$2,000 - \$5,000 in contacting individuals to refute the erroneous information. (Tr. 174) Even so, there was no evidence establishing a causal connection between the publication of the Special Notice to the five subscribers, none of whom were customers of Greenmoss, and the company's alleged injury and damages.

Greenmoss contended that the Special Notice had prompted one of the subscribers, a bank, to terminate its lending relationship with the company. But a representative of the bank, called by D&B, testified that

\* "Tr." signifies citations to pages of the separately-numbered trial transcript included in the Record.

when he received the Special Notice he did not believe it. He confirmed that day with Mr. Flanagan that Greenmoss was "still alive and kicking and [wasn't] bankrupt." (Tr. 212-13) He testified that he was the only bank officer who saw the Special Notice, that he favored making the pending loan to Greenmoss, but that two senior officers from the bank's home office declined to make the loan for reasons wholly unrelated to the Special Notice.\* (Tr. 212-13, 215-16, 253-54)

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\* The bank's representative testified as follows concerning the two senior officers' refusal to make the loan to Greenmoss:

The concerns expressed by senior officers who judged this request, they were concerned regarding the high debt to worth ratio, which is a ratio of the total debt of the Corporation divided into their net worth. Their working capital was not sufficient for the level of sales that they had. There was some shareholder loans that either had to be subordinated or converted into equity, and this probably was not possible under Subchapter S. The existing mortgage that we had we felt was the maximum for the value we believe the property had. We would not advance any additional funds on that building.

\* \* \*

Q. Is it fair then to say, Wayne, that the reason that the loan was declined is that the Howard Bank ultimately decided that it was in jeopardy of [not] being repaid should the line of credit be extended?

A. That was the decision, yes.

(Tr. 253-54)

There is no record support for the statement of the Vermont Supreme Court that "the bank put off any future consideration of credit to plaintiff until the discrepancy was cleared up." (J.A. 34-35)

The trial court instructed the jury that this was an action for libel *per se* and that damages, therefore, were presumed:

Words which tend to injure the Plaintiff in its occupation, or proof such as words which tend to impute the insolvency of a business, are libelous *per se*. This means that the Plaintiff *does not need to prove actual damages resulting from the libel since damage and loss is conclusively presumed*.

(J.A. 17) (emphasis added). Later the Court added:

Now if you determine that the Defendant is not entitled to the benefits of a qualified privilege, you must then consider the question of damages; *where, as in this case there is a libel per se, damages are presumed and actual damages may not be proven*, you must determine the amount of compensatory damages to be awarded. In determining the amount of compensatory damages to award, you may consider such items as lost profits and expenditures proximately caused by any wrong doing on the part of the Defendant. Although *the law presumes damages in some amount in a case of libel per se and therefore relieves the Plaintiff of the burden of establishing by specific proof that damages have occurred*, the law does not compel you to return a verdict of substantial damages unless you are persuaded by a preponderance of the evidence that substantial damages have in fact occurred. It is proper, if, in your judgment you deem it to be correct, even in a case of libel *per se*, for you to return a verdict of nominal damages such as One Dollar, or damages in such other amount as

you feel is fair and just compensation to the Plaintiff for the damages actually caused by the Defendant.

(J.A. 19) (emphasis added). Thus, the trial court's instructions on libel *per se* permitted an award of presumed damages and relieved Greenmoss of the necessity of proving damages by specific proof.

The trial court also instructed the jury that it could award punitive or exemplary damages upon a finding that D&B acted with "actual malice." The court did not define "actual malice." Instead, it defined "malice" as follows:

If you find that the Defendant acted in a bad faith towards the Plaintiff in publishing the Erroneous Report, or that Defendant intended to injure the Plaintiff in its business, or that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously . . . .

(J.A. 18-19) (emphasis added). That instruction allowed the jury to award punitive damages without convincing proof of knowledge of falsity or reckless disregard for the truth.

D&B timely objected to the court's instructions on libel *per se* and punitive damages.

After hearing the trial court's charge, the jury returned a verdict for Greenmoss in the amount of \$350,000.00, consisting of \$50,000.00 compensatory damages and \$300,000.00 punitive damages. (J.A. 2) The \$50,000 "compensatory" damage award exceeded Greenmoss' own evidence of actual damages. Greenmoss projected only \$31,000 in lost profits (\$50,000 "projected" profits less \$19,000 profits actually

earned), plus expenses not in excess of \$5,000. (Tr. 97-99) Thus, a substantial portion of the "compensatory damages" award did not even represent *alleged* actual damages.

After the verdict, D&B filed a timely motion for a new trial. (J.A. 2) D&B asserted that the trial court's instructions permitted the jury to award presumed damages and authorized the jury to award punitive damages based on less demanding proof than the "actual malice" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The trial court granted D&B's motion for a new trial on all issues and concluded that its jury instructions had not met the standards of *Gertz*:

The Court made it clear in its charge that the jury was not compelled to award substantial damages absent actual proof of the same. However, other language in the charge may have misled the jury to believe that damages were presumed in some amount in the case. The United States Supreme Court held in *Gertz v. Robert Welch*, 418 U.S. 324:

"The States, however, may not permit recovery of presumed or punitive damages when liability is not based on knowledge of falsity or reckless disregard for the truth, and the private defamation plaintiff who establishes liability under a less demanding standard than the New York Times test may recover compensation only for actual injury."

Reading the charge as a whole, we are persuaded that the charge permitted the jury to believe that

damages could be awarded to the Plaintiff for defamation absent proof of damages and absent a showing of knowledge of falsity or reckless disregard for the truth by the Defendant.

Commentators are in wide disagreement as to the application of *Gertz* in connection with non-media cases. Because of the Court's dissatisfaction with its charge and its conviction that the interests of justice require a new trial, the motion for the Defendant in this regard is granted.

(J.A. 25-27) (emphasis in original).

After other post-trial proceedings, the trial court granted Greenmoss' motion for an interlocutory appeal to the Vermont Supreme Court and certified several questions concerning its order granting a new trial. (J.A. 29-30) The issue underlying the certified questions was the applicability of *Gertz* to "non-media" defendants.

On appeal, the Vermont Supreme Court did not question the trial court's conclusion that the jury instructions were misleading under the standards announced in *Gertz*. Rather, the Vermont Supreme Court held that the constitutional limitations on presumed and punitive damages derived in *Gertz* from the First and Fourteenth Amendments were inapplicable. The Vermont Supreme Court characterized D&B as a "non-media defendant" and held:

[W]e hold that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions.

....  
“When the defamation action is actionable per se the plaintiff can recover general damages without proof of loss or injury, which is conclusively presumed to result from the defamation . . . .”

461 A.2d at 418, 419 (J.A. 40, 42) (citations omitted). As a result, the Vermont Supreme Court held that the trial court erred in granting a new trial and that the trial court should have entered judgment on the verdict.

#### SUMMARY OF ARGUMENT

The Vermont Supreme Court improperly held that limitations on presumed and punitive damages announced in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), apply only to the “media.” In its opinion, the court ignored this Court’s holding in *Gertz* that, absent actual malice, the state interest in compensating private defamation plaintiffs extends no further than compensation for actual injury.

The Constitution protects all defamation defendants against presumed and punitive damages in the absence of actual malice. Neither the language nor the history of the First Amendment suggests that any group should have more freedom of speech or of the press than others. This Court has been historically reluctant to give any class of speakers special First Amendment rights. Giving the “media” a preferred constitutional status would tend to undermine, rather than to support, the values embodied in the First Amendment.

Furthermore, the Vermont Supreme Court’s “media”/“non-media” distinction is unsound and unworkable. In practice, the judiciary’s efforts to divide defendants into “media” and “non-media” classes would

lead to *ad hoc*, inconsistent results in all but the most obvious cases. In their search for an analytical framework for the problem, the lower courts would likely focus on the nature of the speech concerned. That, in turn, would resurrect the “public interest” test of *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). Adopting a “media”/“non-media” dichotomy would contradict *Gertz*, which was prompted by dissatisfaction with the *Rosenbloom* approach.

No legitimate state interest justifies a rule that limits the liability of newspapers, magazines, and broadcasters, while subjecting other speakers to greater exposure. Because the lower court authorized presumed and punitive damages where no actual malice existed, and because the rules announced in *Gertz* should apply to all defamation defendants, the judgment of the Vermont Supreme Court should be reversed, and a new trial should be ordered.

## ARGUMENT

### THE FIRST AND FOURTEENTH AMENDMENTS PROHIBIT THE AWARD OF PRESUMED AND PUNITIVE DAMAGES ABSENT A SHOWING OF ACTUAL MALICE.

#### I.

#### The Vermont Supreme Court Wrongly Refused To Apply First Amendment Limitations On Defamation Damages Recognized In *Gertz v. Robert Welch, Inc.*

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court sought to define "the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." *Id.* at 325. *Gertz* involved a libel action against the publisher of a magazine article which had described the plaintiff as a Communist sympathizer and participant in various Communist organizations and activities. Holding that the plaintiff was a "private individual" and not a "public official" or "public figure," this Court held that the trial court had erred in applying the actual malice rule of *New York Times v. Sullivan*, 376 U.S. 254 (1964). The Court held that the states were free to define their own standards of liability in cases involving defamation of private individuals "so long as they do not impose liability without fault . . ." 418 U.S. at 347.

In *Sullivan*, the Court had focused on the public or private status of the plaintiff to determine applicability of the actual malice liability standard. In *Gertz*, the Court returned to that analytical framework, rejecting the *ad hoc*, content-based approach of the plurality in

*Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). 418 U.S. at 343-44. The Court doubted the wisdom of committing to the judiciary issues of "which publications address issues of 'general or public interest'" or of "'what information is relevant to self-government.'" *Id.* at 346 (quoting *Rosenbloom*, 403 U.S. at 79 (Marshall, J., dissenting)). The Court was also concerned that adherence to *Rosenbloom*

would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an *ad hoc* resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application.

418 U.S. at 343-44; *see id.* at 354 (Blackmun, J., concurring) (definitive ruling in defamation area deemed "paramount" and "of profound importance").

Although in *Gertz* it refused to require private plaintiffs to meet the *Sullivan* actual malice standard for liability, the Court declined to reinstate a jury award based on presumed damages. Acknowledging the "strong and legitimate state interest in compensating private individuals for injury to reputation," the Court nevertheless found that the interest "extends no further than compensation for actual injury." *Id.* at 348-49. The Court reasoned:

We would not, of course, invalidate state law simply because we doubt its wisdom, but here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is

necessary to protect the legitimate interest involved. *It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury.*

*Id.* at 349 (emphasis added). Accordingly, state remedies for defamation were held subject to First Amendment limitations on presumed and punitive damages. *Id.* at 350.

The Court recognized that recovery of presumed damages under the common law of defamation is an "oddity of tort law":

Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. *The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms.* Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. *More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.*

*Id.* at 349 (emphasis added).

The Court was equally concerned with the effect of punitive damages in defamation actions. Like presumed damages, punitive damages—in reality civil fines—were irrelevant to the state interest in compensation for actual injury and threatened the same uncontrolled jury discretion.<sup>7</sup> *Id.* The Court therefore held:

In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.

*Id.* at 350. Because the jury in *Gertz* "was allowed to impose liability without fault and was permitted to presume damages without proof of injury," the Court ordered a new trial. *Id.* at 352.

In this case, the trial court ordered a new trial for the same reason. It found that its charge authorized presumed and punitive damages absent knowledge of falsity or reckless disregard for the truth, and failed to comport with *Gertz*. The Vermont Supreme Court dis-

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<sup>7</sup> As Justice Harlan wrote in *Rosenbloom*:

At a minimum, even in the purely private libel area, . . . the First Amendment should be construed to limit the imposition of punitive damages to those situations where actual malice is proved. This is the typical standard employed in assessing anyone's liability for punitive damages where the underlying aim of the law is to compensate for harm actually caused, see, e.g., 3 L. Frumer, et al., *Personal Injury* § 2.02 (1965); H. Oleck, *Damages to Persons and Property* § 30 (1955), and no conceivable state interest could justify imposing a harsher standard on the exercise of those freedoms that are given explicit protection by the First Amendment.

403 U.S. at 73 (Harlan, J., dissenting).

agreed with the trial court's decision to grant a new trial. Drawing a distinction between "media" and "non-media" defamation, the Vermont Supreme Court determined that *Gertz* applied only to "media" defendants.

The Vermont Supreme Court ignored *Gertz*'s unequivocal pronouncement that, absent actual malice, "the States have *no substantial interest* in securing for [private] plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." 418 U.S. at 349 (emphasis added). The decision on review assumes that the States have a legitimate interest in compensating victims of "non-media" defamation, even where the defendant acted without actual malice. This Court's clear holding to the contrary in *Gertz* makes that assumption untenable. For that reason alone, the lower court's decision should be reversed, and D&B should be granted a new trial.

## II.

### **The Vermont Supreme Court's "Media"/"Non-Media" Distinction Is Unsound And Unworkable.**

#### **A. The First Amendment Protects Freedom Of Expression And Does Not Accord Special Treatment To Any Group Of Speakers.**

Neither the language nor the history of the First Amendment supports the view that "media" expression should be exalted above other speech. See generally Lange, *The Speech and Press Clauses*, 23 U.C.L.A. L. Rev. 77 (1975). Nor is there anything in the First Amendment to suggest that what the communications industry has to say is more worthy of constitutional protection than the words of merchants,

scientists, or machinists. The lower court's decision, however, would accord special treatment to an undefined class of "media" speakers. Other speakers would be subject to unlimited exposure for defamation, even where no actual malice existed.

In a variety of contexts, this Court has refused to acknowledge favored classes of speakers with greater constitutional protection than the ordinary citizen. "'[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . .'" *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790-91 (1978) (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976)). See *Pell v. Procunier*, 417 U.S. 817, 834 (1974) ("Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded.") (quoting *Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972)); accord *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974); see also *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) ("[T]he basic principles of freedom of speech and the press . . . do not vary.").

The very task of including some entities within the "institutional press" while excluding others, whether undertaken by legislature, court, or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country. *Lovell v. Griffin*, *supra*, 303 U.S. at 451-452, 58 S.Ct. at 668-669. Further, the officials undertaking that task would be required to distinguish the protected from the unprotected on the basis of such variables as content of expression, frequency or fer-

vor of expression, or ownership of the technological means of dissemination. Yet nothing in this Court's opinions supports such a confining approach to the scope of Press Clause protection. Indeed, the Court has plainly intimated the contrary view:

"Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.' . . . The informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public. . . ." *Branzburg v. Hayes*, 408 U.S. 665, 704-705, 92 S.Ct. 2646, 2668, 33 L.Ed.2d 626 (1972), quoting *Lovell v. Griffin*, *supra*, 303 U.S., at 450, 452, 58 S.Ct., at 668, 669.

*Bellotti*, 435 U.S. at 801-02 (Burger, C.J. concurring).

The holdings in *Sullivan* and *Gertz* were not expressly limited to the "media."<sup>8</sup> *Sullivan* applied the

\* In *Sullivan*, the Court's opinion began by declaring that, "We are required in this case to determine for the first time the extent to which the constitutional protections for *speech and press* limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct." 376 U.S. at 256 (emphasis added). In *Gertz*, the Court spoke of its struggle "to define the proper accommodation between the law of defama-

same actual malice test not only to *The New York Times*, but also to the persons whose names had appeared in the advertisement at issue. *Sullivan*, 376 U.S. at 286. *Accord St. Amant v. Thompson*, 390 U.S. 727 (1968) (*Sullivan* test applied in case involving individual defendant not a member of the press); *Henry v. Collins*, 380 U.S. 356 (1965) (*Sullivan* test for liability applied to a private individual's statements).

More important, the justifications for limiting presumed and punitive damages—the absence of state interest and the fear that uncontrolled jury discretion would inhibit the exercise of First Amendment freedoms—do not depend upon the identity of the speaker. The need to avoid punishing the free flow of information exists regardless of the medium through which the information flows. The First Amendment safeguards individual freedom of expression, not the promotion of specialized groups of communicators. As Chief Justice Burger wrote in his concurring opinion in *Bellotti*:

Because the First Amendment was meant to guarantee freedom to express and communicate ideas, I can see no difference between the right of those who seek to disseminate ideas by way of a newspaper and those who give lectures or speeches and seek to enlarge the audience by publication and wide dissemination. "[T]he purpose of the Constitution was not to erect the

tion and *the freedoms of speech and press* protected by the First Amendment." 418 U.S. at 325 (emphasis added). Later in the *Gertz* opinion, the Court restated its concern "to assure *to the freedoms of speech and press* that 'breathing space' essential to their fruitful exercise." 418 U.S. at 342 (emphasis added) (citations omitted.)

press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it. ' . . . the liberty of the press is no greater and no less . . . ' than the liberty of every citizen of the Republic."

435 U.S. at 801-02 (quoting *Pennekamp v. Florida*, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring)). See also Comment, *The Constitutional Law of Defamation: Are All Speakers Protected Equally?*, 44 Ohio St. L. J. 149, 167 (1983) ("The Supreme Court has consistently viewed the different first amendment freedoms as merely different aspects of the same guarantee—the right of free expression."); Note, *Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Nonmedia Defendants*, 95 Harv. L. Rev. 1876, 1885 (1982) ("Creating a mediaocracy contradicts the principle of equal liberty of expression: in a free society, everyone should have an opportunity to present her ideas in the marketplace."); Lewis, *A Preferred Position For Journalism?*, 7 Hofstra L. Rev. 595, 605 (1979) ("No Supreme Court decision has held or intimated that journalism has a preferred constitutional position.")\*

\* Anthony Lewis has also noted:

Blackstone, recording the successful outcome of the long English struggle against press censorship, wrote: "Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press. . . ." Every freeman, that is, not just those organized or institutionalized as "the press." Freedom of the press arose historically as an individual liberty. Eighteenth-century Americans saw it in those terms, and the same view is reflected in Supreme Court decisions; freedom of speech and of the press, Chief Justice Hughes said, are "fundamental personal rights." To depart from that principle—to adopt a corporate

#### B. Affirming The Lower Court's Decision Would Lead To *Ad Hoc*, Inconsistent Rulings Dependent Upon Undesirable Assessments Of Particular Speakers' Messages.

The Vermont Supreme Court's "media"/"non-media" dichotomy creates practical problems no less important than the concerns expressed above. If the application of First Amendment limitations on presumed and punitive damages would now require a threshold ruling as to the defendant's status, the judiciary will be forced to determine who is and who is not a member of the "media." That determination will add further complexity to an already overly complex tort.<sup>10</sup>

view of the freedom of the press, applying the press clause of the first amendment on special terms to the "institution" of the news media—would be a drastic and unwelcome change in American constitutional premises. It would read the Constitution as protecting a particular class rather than a common set of values, and we have come to understand, after much struggle, that the Constitution "neither knows nor tolerates classes among citizens."

Lewis, *supra* p. 20, at 625-26 (footnotes omitted).

Professor Lange has other, no less compelling, fears:

[I]ndividual interests in speech may be even more seriously threatened by separate constitutional status. With no distinct institutional identification—and now without claim to immediate theoretical alliance with the press—they may find it more difficult to stand up against the constraints which a mass society inevitably finds it convenient to impose.

Lange, *supra* p. 16, at 113 (footnote omitted).

<sup>10</sup> The "media"/"non-media" issue would doubtless require factual development, prompting further discovery, forcing additional briefs, and, in general, making cases of this sort even more expensive—in time, money, and resources—than they already are.

In all but the most obvious situations, the "media"/"non-media" distinction would be impossible to apply. Courts grappling with the issue would be forced to answer a variety of questions. For example, would the size of the speaker's audience be determinative? If the speaker's audience were small, could the stature of the audience entitle the speaker to greater constitutional protection than that available to speakers addressing less influential groups? What should a court do with an individual who earns a livelihood by making speeches to select groups of leading academics or business executives? Would a columnist in a trade or professional journal be more entitled to the appellation "media" than such a speaker? How should the courts treat the person who blurts out a defamatory quip on a television talk show? Would occasional contributors to newspapers be regarded as "media" when repeating their own published statements in a private letter to a friend? Faced with such questions, courts would inevitably reach conflicting decisions.<sup>11</sup> The probable result

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<sup>11</sup> As the Court observed in *Branzburg v. Hayes*, 408 U.S. 665 (1972):

The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.

*Id.* at 703-04.

would be the very uncertainty and unpredictability the Court had hoped to dispel when it decided *Gertz*.<sup>12</sup>

In their search for the decisive factor, the lower courts would likely find themselves deciding the "media" issue by asking whether particular speakers' messages could be expected to have general interest or mass appeal. The dangers of that approach are obvious. Focusing on general interest or appeal permits unjust discrimination according to the decision-maker's values. Unpopular speech could be given less protection, not because it is less important, but only because it is less popular.

The Court has acknowledged the First Amendment's hostility to content-based regulation. See *Police Department v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); *United States Postal Service v. Counsel of Greenburgh Civic Associations*, 453 U.S. 114, 132 (1981) (valid restrictions on time, place and manner of speech must be "content-neutral"); *see generally* Note, *supra* p. 20, at 1880-82 (anti-content-regulation principle is "implicit in the Court's first amendment cases"), and cases cited. Judicial attempts to regulate content interfere with a process that the First Amendment reserves to the marketplace of ideas. See *Dun & Bradstreet, Inc. v. Grove*, 404 U.S. 898, 903 (1971) (Douglas, J., dissenting) ("[I]f the rough and tumble of debate is the best vehicle for producing approximations of fac-

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<sup>12</sup> "[I]t is of profound importance for the Court to come to rest in the defamation area and to have a clearly defined majority that eliminates the unsureness engendered by *Rosenbloom's* diversity." 418 U.S. at 354 (Blackmun, J., concurring).

tual truth or preferred opinion, the courts have no business making premature and interim evaluations of contested statements' merits.”).

It was the Court's dissatisfaction with content regulation that led it to abandon the short-lived *Rosenbloom* “public interest” test. *Gertz*, 418 U.S. at 346 (discussed at pp. 12-13, *supra*). *See also Sullivan*, 376 U.S. at 271 (“The constitutional protection does not turn upon ‘the truth, popularity, or social utility of the ideas and beliefs which are offered.’”) (quoting *NAACP v. Button*, 371 U.S. 415, 445 (1963)) *Time, Inc. v. Hill*, 385 U.S. 374 (1967); (applying *Sullivan* rule to *Life* magazine review of play); *Shiffrin, Defamatory Non-media Speech and First Amendment Methodology*, 25 U.C.L.A. L. Rev. 915, 926 (1978) (“*Gertz* plainly states that communications which are deemed to have nothing to do with self-government and which do not relate to public issues fall within the ambit of first amendment protection. . . .”).

The Vermont Supreme Court's “media”/“non-media” distinction is nothing more than content regulation couched in terms of interest balancing. *See Note, supra* p. 20, at 1885-86 (“[P]rotecting speakers based on their media status is a device for protecting political messages; it is content regulation by another name.”). Citing language reminiscent of the *Rosenbloom* plurality, the Vermont Supreme Court regarded D&B's Special Notice unworthy of protection because it involved

“no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability

causing a reaction of self-censorship by the press.”

(J.A. 39) (citation omitted). That language signals a return to the concepts the Court found inadequate in *Gertz*.<sup>13</sup>

The lower court regarded “political speech” as the First Amendment's sole concern. But the Constitution protects far more than that:

It is no doubt true that a central purpose of the First Amendment “was to protect the free discussion of governmental affairs.” *Post*, at 1811, quoting *Buckley v. Valeo*, 424 U.S. 1, 14, 96 S.Ct. 612, 632, 46 L.Ed.2d 659, and *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 1436, 16 L.Ed.2d 484. But our cases have never suggested that expression about philosophical social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection.

*Abood v. Detroit Board of Education*, 431 U.S. 209, 231 (1977); *see also Thornhill v. State of Alabama*, 310 U.S. 88, 102 (1940) (“Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed

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<sup>13</sup> Prior to *Gertz*, some courts had applied *Rosenbloom*'s now discarded “public interest test” to deny First Amendment protection to financial reports. *See Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25 (5th Cir. 1973), *cert. denied*, 415 U.S. 985 (1974); *Grove v. Dun & Bradstreet, Inc.*, 438 F.2d 433 (3rd Cir.) (“business or credit standing” held not a “matter of real public interest”), *cert. denied*, 404 U.S. 898 (1971); *Kansas Electric Supply Co. v. Dun & Bradstreet, Inc.*, 448 F.2d 647 (10th Cir. 1971), *cert. denied*, 405 U.S. 1026 (1972). These decisions involved precisely the type of *ad hoc* content-based adjudication ended by *Gertz*.

as appropriate to enable the members of society to cope with the exigencies of their period.”)

As one commentator has aptly stated:

[A]llocating protection on the basis of political content is repugnant to the very purpose of the first amendment, for such allocation will follow majoritarian impulses. The “political” label can be not only stretched to protect popular messages, but also shrunk to chill unpopular messages. Majorities, however, do not need a constitutional amendment to protect their speech; they can secure statutory protection by pressuring their popularly elected legislators. It is minorities who need a structural provision to shield their messages, regardless of who is in power. No majority is wise or benevolent enough to determine which speech is important and which is not. By enhancing the free flow of all messages, the first amendment ensures that everyone—majorities and minorities—can help to generate the ideas “members of society [need] to cope with the exigencies of their period.”

Individuals need information about the reputations of other members of the groups they interact with at least as much as—if not more than—they need information about the character of candidates for public office. Ordinary speakers require breathing space for nonpublic speech just as the media require it for public speech. . . .”

Note, *supra* p. 20, at 1881, 1894 (footnotes omitted).

Even if the First Amendment permitted the type of judicial favoritism to “public” or “political” speech the

Vermont Supreme Court would give it, distinguishing between “media” and “non-media” defendants does not serve that purpose. There is no reason to believe that a message broadcast by a “media” voice promotes public or political goals any better than the message of a “non-media” speaker. To the contrary:

Public issues can be debated with as much force among individuals as in the press. . . . [T]he mass press does not originate ideas; it spreads them around, shaping, leveling, and smoothing them in the process. . . . The process has its uses, to be sure, but someone must still dig. And in the field of human ideas and their original expression, that function belongs first to individuals. . . . Nonmedia speech is always the antecedent of media speech. . . . [I]t is not sensible to treat two speakers differently merely on the ground that one proposes to speak privately while one intends to use the media.

*Lange, supra* p. 16, at 116-17 (footnote omitted). *Accord Jacron Sales Co. v. Sindorf*, 276 Md. 580, 592, 350 A.2d 688, 695 (1976) (“Issues of public interest may equally be discussed in media and non-media content, and the need for a constitutional privilege, therefore, obtains in either case.”); *Restatement (Second) of Torts* § 580A comment h (1976). “[T]he press does not have a monopoly on either the First Amendment or the ability to enlighten.” *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 782 (1978).

#### C. First Amendment Limitations On Presumed And Punitive Damages Should Apply Uniformly To All Speakers.

The Court’s analysis in *Gertz* permits no distinction between the “media” and everyone else:

[T]he reasons given by the Court for its hostility to strict liability for innocent defamation by the press would seem equally appropriate to innocent defamation by non-media defendants, especially where an individual's defamatory statement is likely to cause *less* harm because of its more limited dissemination. In addition, imposition of strict liability upon individuals who are apt to be both less circumspect in their name-calling and less aware of the risk of liability and thus less likely to insure against it, seems to make less sense as a matter of tort law than imposing strict liability upon large enterprises whose daily operations pose a substantial risk of predictable harm.

Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349, 1418 (1975) (emphasis added) (footnote omitted). Accord Collins & Drushal, *Reaction of the State Courts to Gertz v. Robert Welch, Inc.*, 28 Case W. Res. L. Rev. 306, 334 (1978); Wade, *The Communicative Torts and The First Amendment*, 48 Miss. L. J. 671, 699-700 (1977).

The rationale behind the constitutional defamation privileges is based on the premise that the fear of a potential defamation lawsuit will inhibit first amendment activity. The rationale is applicable to all forms of speech.

Comment, *supra* p. 20, at 184. Accord Yasser, *Defamation as a Constitutional Tort: With Actual Malice for All*, 12 Tulsa L. J. 601, 625 (1977) ("A constitutional privilege is applied across the board and not nibbled away.")

A "media"/"non-media" distinction would promote injustice. "Media" and "non-media" defendants tried together would be governed by different standards. A newspaper publishing an individual's statement verbatim could "create" a constitutional privilege that would not otherwise apply.<sup>14</sup> Another individual who then repeated the newspaper's statement without knowledge of any falsity could then be held liable for both presumed and punitive damages.<sup>15</sup> Or, as in this case, the same information published by D&B would be judged differently if published in a local newspaper.

The Court should, therefore, take this opportunity to make explicit what *Gertz* already implicitly commands:

The "ultimate expansion of *Gertz* to provide equal standards of recovery against both media and non-media defendants seems predictable" if, in fact, one can call it an "expansion" at all. The well-established theory of our Constitution appears to be that "every citizen may speak his mind and every newspaper express its view." The

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<sup>14</sup> See Comment, *supra* p. 20, at 171 ("It is absurd to consider that a letter published in a letters-to-the-editor column of a newspaper would be constitutionally protected, while the same words spoken to a friend or neighbor would not.") (footnote omitted).

<sup>15</sup> Under common law notions of libel, an individual finding himself in that predicament very likely would be unable to recover contribution from either the "media" defendant or the original publisher, since contribution lies only among joint tortfeasors, while the common law regards each defamatory publication as a separate tort. See *Howe v. Bradstreet Co.*, 135 Ga. 564, 565, 69 S.E. 1082, 1083 (1911) ("If the original publisher does not participate in a republication of the libel by another, he is not liable in a joint action with the second publisher.")

case law clearly supports the view that the constitutional privilege is as available to the non-media defendant as to the media defendant.

Yasser, *supra* p. 29, at 624 (footnote omitted).

The result Petitioner seeks is the natural consequence of existing doctrine:

[T]he goal of first amendment theory should be to equate and reconcile the interests of speech and press, rather than to separate them. This is scarcely to suggest a new theory; there are as many examples of how this might be done as there have been cases referring to "freedom of expression" or turning on "freedom of speech and press." If anything "new" is needed, it is probably a clearer understanding of the risks which may be incurred when the reference point is something less than these concepts.

Lange, *supra* p. 16, at 118.

Commentators have implored the Court to remove all doubts that *Gertz* applies to everyone:

[T]he distinction between the press and the rest of us will simply not hold up, either on historical or practical grounds.

....  
The law in the area of injury to reputation is on the verge of chaos. Attempts by the Court to eliminate confusion have almost invariably increased it.

....  
[One] . . . reason to believe the Court will be obliged to generalize the *Gertz* solution to cover all cases of injury to reputation is the Court's

gradually increasing awareness that many of the traditional methods of distinguishing among types of speech do not make much sense.

....  
*The only way to accomodate all the conflicting interests in a manner that is socially acceptable, therefore, will be to generalize the Gertz negligence and actual damage solution.*

Christie, *Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches*, 75 Mich. L. Rev. 43, 58, 63, 64, 66 (1976) (emphasis added) (footnote omitted). Accord Collins & Drushal, *supra* p. 28, at 333-34; Yasser, *supra* p. 29, at 623-26; Comment, *supra* p. 20, at 169; 52 Wash. L. Rev. 915, 935 (1978).

The Court has already considered the tension between the First Amendment and the law of defamation. In *Gertz*, it struck a balance which fairly serves the competing interests of free speech and personal reputation. The Court achieved that accomodation by focusing on the status of the plaintiff, not the speaker or the message. The Court should not depart from that approach and embark again upon the ill-fated and analytically unacceptable course the Vermont Supreme Court has charted. Instead, the time has come to carry *Gertz* to its logical conclusion. The only way to reach a just result is to apply the same constitutional limitations on damages to every defamation defendant.

## CONCLUSION

Based upon the foregoing, Petitioner Dun & Bradstreet, Inc. respectfully urges the Court to reverse the judgment of the Vermont Supreme Court and order a new trial.

Respectfully submitted,

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# JOINT APPENDIX

4  
No. 83-18

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1983

DUN & BRADSTREET, INC.,  
*Petitioner,*

v.

GREENMOSS BUILDERS, INC.,  
*Respondent.*

On Writ of Certiorari to the  
Supreme Court of the State of Vermont

JOINT APPENDIX

GORDON LEE GARRETT, JR.      THOMAS F. HEILMANN  
HANSELL & POST      THOMAS F. HEILMANN,  
3300 FIRST ATLANTA TOWER      P.C.  
Atlanta, Georgia 30383      Five Burlington Square  
(404) 581-8000      P.O. Box 216  
*Counsel for Petitioner*      Burlington, Vermont  
      05402  
      (802) 864-4555  
*Counsel for Respondent*

Petition for Writ of Certiorari Filed July 8, 1983  
Certiorari Granted November 7, 1983

BEST AVAILABLE COPY

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STATE OF VERMONT  
WASHINGTON SUPERIOR COURT

Greenmoss Builders, Inc. :  
:  
v. : Docket No. S326-77WnC  
:  
Dun & Bradstreet, Inc. :

Relevant Docket Entries

Filing or  
Order Date

October 21, 1977 Summons, Complaint & Return of Service filed.

November 21, 1977 Entry of Appearance; Answer & First Defense-Sixth Defense filed by Peter Monte.

January 23, 1980 Motion to Dismiss as to the individual plaintiff, John Flanagan is GRANTED.

April 8, 1980 Defendant's Request to Charge Jury and Memo of Law Concerning Existence & Nature of Qualified Privilege filed by Attorney Monte.

April 9, 1980 Plaintiff's Request to Charge filed.

April 9, 1980

Plaintiff's Verdict

In this cause the jury on their oath say the Defendant is liable in manner and form as the Plaintiff has alleged in its complaint; They therefore find for the Plaintiff to recover of the Defendant \$350,000.00 dollars, damages.

If punitive damages are allowed and represent any portion of the total damages set forth above, please indicate below the dollar amount allowed for punitive damages,

\$300,000.00

Signed,

Vivian Bryan, Foreperson

April 22, 1980

Judgment filed and copies mailed to counsel.

April 30, 1980

Post-Trial Motions Under Rules 50 and 59 & Defendant's Memorandum in Support of Post-Trial Motions Under Rules 50 and 59 filed by Attorney Monte.

May 12, 1980

Hearing on all post-judgment motions; Hayes, J.; Hall, R.; Attorney Monte requested transcript of hearing per Reporter Hall.

October 20, 1980

Order filed and copies mailed to counsel;

It is hereby ORDERED and ADJUDGED:

That all motions of the Defendant for judgment notwithstanding the verdict are DENIED;

That Defendant's motion for a new trial on all issues is GRANTED.

October 29, 1980

Memorandum of Law & Petition for Permission to Appeal filed by Attorney Heilmann.

April 29, 1981

Order filed and copies mailed to counsel 4/29/81;

It is hereby ORDERED and ADJUDGED that the Plaintiff's Motion for Permission to Appeal and the alternative requests of the Defendant are GRANTED.

**SUPREME COURT OF THE STATE  
OF VERMONT**  
(Title omitted in printing)

Filing or  
Order Date

April 15, 1983

Order and Opinion of the Supreme Court of the State of Vermont dated April 15, 1983

Relevant Docket Entries

**STATE OF VERMONT  
WASHINGTON COUNTY, SS.**

**GREENMOSS BUILDERS, INC.  
and JOHN FLANAGAN**

vs.

**DUN & BRADSTREET, INC.**

**VERMONT  
SUPERIOR  
COURT  
WASHINGTON  
COUNTY  
Civil Action  
Docket No. \_\_\_\_\_**

**COMPLAINT**

1. Plaintiff Greenmoss Builders, Inc., is a corporation organized and existing under the Laws of the State of Vermont with its principal place of business in Waitsfield, Vermont.

2. Plaintiff John Flanagan is a citizen and resident of Vermont residing in Waitsfield, Vermont. In 1971 plaintiff Flanagan created Greenmoss Builders and did business under said style until 1973 when Greenmoss Builders, Inc., was incorporated under the laws of the State of Vermont. Plaintiff Flanagan is the President, principal shareholder and prime moving force of said corporation. The members of the public in the community wherein the plaintiffs transact their business identify plaintiff Flanagan with Greenmoss Builders and acknowledge that plaintiff Flanagan as owner of said corporation, has a proprietary interest therein.

3. Defendant Dun and Bradstreet, Inc., is, upon information and belief, a corporation organized and existing under the Laws of the State of Delaware with its

principal place of business in New York. Among the business activities of defendant Dun & Bradstreet is the collection and dissemination of economic information concerning various business concerns to its subscribers.

4. On July 26, 1976, Dun & Bradstreet carelessly and negligently and with reckless disregard for the truth, informed its subscribers by means of a Special Notice, that Greenmoss Builders, Inc., had filed a voluntary petition in bankruptcy under Chapter 4 of the Bankruptcy Act. Defendant Dun & Bradstreet undertook no investigation to determine the truth of the information circulated by it which information was untrue at the time of circulation and remains untrue at present and which untruth, defendant Dun & Bradstreet would have discovered in the event it undertook any investigation of the matter.

5. In addition to the matters complained of in the preceding paragraph, by special notice dated July 26, 1976, defendant Dun & Bradstreet grossly misrepresented the assets and liabilities of the corporation and said misrepresentation was done in a careless and negligent manner with reckless disregard for the truth. Defendant Dun & Bradstreet undertook no investigation or examination of the truth of the matters asserted by it and had such investigation been undertaken the true state of the plaintiff's assets and business affairs would have been revealed.

6. As a direct and proximate result of the acts and omissions of the defendant as aforesaid, and as a further and direct and proximate result of its reckless disregard for the truth, plaintiff Greenmoss Builders, Inc., and plaintiff John Flanagan have suffered damage, embarrassment, humiliation, injury and loss to

their business reputations and status and standing in the community.

7. The false and defamatory statements referred to in Paragraphs #4 and #5 were published and circulated by defendant Dun & Bradstreet to members of the public and since they affect the plaintiffs in their trade or business, said erroneous statements constitute defamation and libel per se.

WHEREFORE, each plaintiff demands the sum of Seven Thousand Five Hundred (\$7,500.00) Dollars each in compensatory damages and each plaintiff demands the sum of Fifteen Thousand (\$15,000.00) Dollars each in punitive or exemplary damages from defendant.

Pursuant to Rule 38 V.R.C.P. plaintiffs Greenmoss Builders Inc., and John Flanagan herein demand a trial by jury as of all issues triable in this cause.

Dated at City of Barre, County of Washington and State of Vermont this 13th day of October, 1977.

By:

THOMAS F. HEILMANN, Esq.

STATE OF VERMONT  
WASHINGTON COUNTY, SS

WASHINGTON  
SUPERIOR  
COURT  
Docket No.: S-  
326-77Wnc

GREENMOSS BUILDERS, INC. )  
and JOHN FLANAGAN )  
 )  
vs. ) ANSWER  
 )  
DUN & BRADSTREET, INC. )

NOW COMES Dun & Bradstreet, Inc., by and through its attorneys Young & Monte, and for its answer to plaintiffs' complaint says as follows:

FIRST DEFENSE

1. Defendant lacks sufficient knowledge to admit or deny the allegations of Paragraph 1 of plaintiffs' complaint and calls upon plaintiffs to prove the same.
2. Defendant lacks sufficient knowledge to admit or deny the allegations of Paragraph 2 of plaintiffs' complaint and calls upon plaintiffs to prove the same.
3. Defendant admits the allegations of Paragraph 3 of plaintiffs' complaint.
4. Defendant denies each and every allegation contained in Paragraph 4 of plaintiffs' complaint.
5. Defendant denies each and every allegation contained in Paragraph 5 of plaintiffs' complaint.

- 6. Defendant denies each and every allegation contained in Paragraph 6 of plaintiffs' complaint.
- 7. Defendant denies each and every allegation contained in Paragraph 7 of plaintiffs' complaint.

#### SECOND DEFENSE

- 8. This court lacks jurisdiction over the subject matter of this cause and lacks jurisdiction over the person of the defendant.

#### THIRD DEFENSE

- 9. The complaint fails to state a claim upon which the plaintiff, John Flanagan, can be granted relief against the defendant.

#### FOURTH DEFENSE

- 10. The complaint fails to state a claim upon which the plaintiff, Greenmoss Builders, Inc., can be granted relief against the defendant.

#### FIFTH DEFENSE

- 11. Any allegedly defamatory statement which the plaintiffs claim was made by the defendant and is the cause of any alleged injury to the plaintiffs was made by the defendant in good faith in the course of its business as a commercial credit rating and reporting agency, and any such allegedly defamatory statement was made by the defendant only in response to a legitimate request for credit information made of the defendant by one of its subscribers. Any such alleged defamatory statement is therefore the subject of a

privilege, which privilege the defendant claims the benefit of.

#### SIXTH DEFENSE

- 12. All statements allegedly made by defendant pertaining to plaintiffs were true.

WHEREFORE, defendant prays:

- 1. The plaintiffs' complaint be dismissed.
- 2. That plaintiffs be ordered, pursuant to Rule 9(b), to plead with more particularity the statements alleged to have been made by defendant which were defamatory.
- 3. That judgment be entered for the defendant.
- 4. That defendant be awarded its costs, including a reasonable attorney fee.
- 5. For such other and further relief as is just.

DATED at Northfield, County of Washington and State of Vermont this 18th day of November, 1977.

DUN & BRADSTREET, INC.  
By Its Attorneys  
YOUNG & MONTE

By \_\_\_\_\_  
Peter J. Monte, Esquire

STATE OF VERMONT  
 WASHINGTON SUPERIOR COURT  
 (Title omitted in printing)

<b>DUN &amp; BRADSTREET, INC.</b>	<b>SPECIAL NOTICE</b>		
D-U-N-S			
No. 06-675-5349	Jul. 26, 1976	Rating	NQ
Greenmoss Builders			Formerly
Inc.			
	Building Contractor		EE2
Box 517		Started	1971
RTE #100	SIC Nos.		
Waitsfield, VT 05673	15 22 15 42 15 31		
Tel. 802 496-3124			

**PETITION UNDER NATIONAL BANKRUPTCY  
 ACT**

**Voluntary Petition In Bankruptcy Filed Under  
 Chapter IV**

Date of Filing: July 1, Case # 76-201  
 1976

City & State Filed:  
 Burlington, VT  
 Filed By: Richard Brock

**Plaintiff's  
 2**

**LIABILITIES:**

Total: \$ 37,729

**ASSETS:**

Total: 26,835

Attorney: Richard Brock, Box 725, Montpelier, VT  
 Referee: Charles J. Marro, Merchants Row,  
 Rutland, VT

07-28(76 /34 ) 0056/02 6 092

This report is submitted only to J. Flanagan for the  
 purpose of confirming accuracy and is not to be exhib-  
 ited or its contents revealed to anyone else. It should  
 be returned to Dun & Bradstreet, Inc. within 7 days.

STATE OF VERMONT  
WASHINGTON SUPERIOR COURT  
(Title omitted in printing)

D-U-N-S

No. 06-675-5349	Aug. 3, 1976	Rating	—
Greenmoss Builders			
Inc.			
Box 357	Building Contractor	Started	1971
Rte. #100	SIC Nos.		
Waitsfield, VT 05673	15 22 15 42 15 31		
Tel. 802 496-2561			

**Plaintiff's**

## CORRECTION      CORRECTION      CORRECTION

Any report to the effect that this corporation filed a voluntary petition in bankruptcy on July 1, 1976 under Chapter IV, file number 76-201 is erroneous and should be disregarded. The facts are that the bankruptcy was filed individually by an employee of this corporation. Greenmoss Builders Inc. continues operations as previously reported.

08-03(13 /29 )0176/06 41501 6 092

This report is submitted only to \_\_\_\_\_ for the purpose of confirming accuracy and is not to be exhibited or its contents revealed to anyone else. It should be returned to Dun & Bradstreet, Inc. within \_\_\_\_\_ days.

STATE OF VERMONT  
WASHINGTON SUPERIOR COURT  
(Title omitted in printing)  
EXCERPTS FROM INSTRUCTIONS TO JURY

\* \* \*

[Tr. 484] Now in this case I'm going to discuss with you the defamation aspects of it and the damage questions that may be related to it. The Plaintiff, as you know, Greenmoss Builders, Inc. has filed suit seeking compensatory and punitive damages on account of an alleged libel and defamation in the form of a Report [Tr. 485] issued by Dun & Bradstreet on July 26, 1976 in which it was erroneously reported that the Plaintiff had filed for bankruptcy. A libel is a false and defamatory statement negligently or recklessly published of and concerning the Plaintiff which tends to injure its reputation in the eyes of a substantial, respectable group, even though they are a minority of the total community, or of the Plaintiff's associates. A corporation is deemed a person under our law, and like a person, a corporation may be the subject of a libel. The Defendant in this case has conceded that the report of Plaintiff's bankruptcy was false and erroneous; that the Report was published to others by the Defendant is also uncontested. Words which tend to injure the Plaintiff in its occupation, or proof such as words which tend to impute the insolvency of a business, are libelous *per se*. This means that the Plaintiff does not need to prove actual damages resulting from the libel since damage and loss is conclusively presumed. In the present case, I instruct you that the Defendant's Erroneous Report of the Plaintiff's bankruptcy constitutes libel as a matter of law unless you find that the Defendant was privileged to make that Report and publish

it to subscribers. Under the law, a commercial credit rating agency enjoys a qualified privilege in making reports to [Tr. 486] its subscribers. This means that a commercial credit rating agency cannot be held accountable for erroneous statements which are merely negligent. This is because commercial rating agencies are deemed to serve a legitimate business need which might not be met in the absence of the privilege. The Defendant has the burden of proving that it is a commercial credit rating agency, and I don't think there's any dispute about that in this case. If you determine that the Defendant is a commercial credit rating agency, the qualified privilege will apply; however, this is but a qualified privilege. If a commercial credit rating agency publishes an Erroneous Report to customers other than those who had recently requested credit information regarding the subject of a report, the agency has abused the privilege and may be held liable. In addition, if an Erroneous Credit Report is maliciously or recklessly made by a commercial rating agency, the agency is not entitled to the protection of that privilege. So in terms of the case before you, if you determine that the Defendant is ordinarily covered by the qualified privilege you must then determine whether that privilege has been abused, either by excessive publication to customers who have not requested credit information regarding the Plaintiff, or by malicious or reckless publication of the report. The Plaintiff has the burden of proving [Tr. 487] that the privilege has been destroyed. The conduct which would destroy the qualified privileges of a commercial credit agency must be more than mere negligence or want of sound judgment. It must show malice or lack of good faith on the part of the Defendant. If you find that the Defendant acted in a bad faith towards the Plaintiff in publishing the Erroneous Report, or that

Defendant intended to injure the Plaintiff in its business, or that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously and the privilege is destroyed. Further, if the Report was made with reckless disregard of the possible consequences, or if it was made with the knowledge that it was false or with reckless disregard of its truth or falsity, it was made with malice. Plaintiff has the burden to persuade you by the preponderance of the evidence that the Defendant's conduct in this case amounted to malice as I have defined it.

Now if you determine that the Defendant is not entitled to the benefits of a qualified privilege, you must then consider the question of damages; where, as in this case there is a libel per se, damages are presumed and actual damages may not be proven, you must determine the amount of compensatory damages to be [Tr. 488] awarded. In determining the amount of compensatory damages to award, you may consider such items as lost profits and expenditures proximately caused by any wrong doing on the part of the Defendant. Although the law presumes damages in some amount in a case of libel per se and therefore relieves the Plaintiff of the burden of establishing by specific proof that damages have occurred, the law does not compel you to return a verdict of substantial damages unless you are persuaded by a preponderance of the evidence that substantial damages have in fact occurred. It is proper, if, in your judgment you deem it to be correct, even in a case of libel per se, for you to return a verdict of nominal damages such as One Dollar, or damages in such other amount as you feel is fair and just compensation to the Plaintiff for the damages actually caused by the Defendant.

Now a word or two about punitive damages. If you find that Defendant's conduct was not privileged, and if you also find, on the basis of clear and convincing evidence, that the Defendant acted with actual malice in publishing the article in question, then you may award Plaintiff punitive or exemplary damages in addition to the actual damages assessed. Punitive damages are designed to punish the offender and serve as [Tr. 489] an example to others. Whether or not to award such damages and to the amount thereof are matters confided solely to you for decision. In considering whether Defendant acted with actual malice so as to support an award of punitive damages, you may consider the conduct of the Defendant both before and after the publication of the Erroneous Report. In considering whether or not to award punitive damages, you may take into account whether Defendant took any steps to mitigate or reduce the injury to the Plaintiff. If you find the Defendant attempted to mitigate damages, you must lessen your award of damages to the extent that you believe appropriate under the circumstances.

Now in defamation actions, the law requires that you consider whether the Defendant has taken any steps to mitigate damages. Mitigation of damages is action taken by the Defendant to lessen the extent or severity of the injuries sustained by the Plaintiff because of Defendant's conduct. If you find that the Defendant took steps to alleviate damages or lessen the extent or severity of Plaintiff's damages, then you must take this mitigating conduct of the Defendant into account in determining the amount of damages and you must lessen your award as I've indicated to the extent that you believe is appropriate in all the circumstances.

[Tr. 490] Now ordinarily in a civil case one is not allowed to bring before the the jury the wealth of the Defendant or even to make any suggestions as to the wealth of the Defendant. And in considering whether or not Defendant is liable, you may not take into account Defendant's wealth. In considering what compensatory damages must be, if you reach that question, you may not take into account Defendant's wealth, but if you feel that there has been such outrageous conduct as would warrant punitive damages, then and only then may you take into consideration the wealth of the Defendant.

\* \* \*

STATE OF VERMONT  
WASHINGTON COUNTY, SS.

GREENMOSS BUILDERS, INC. ) WASHINGTON  
 ) SUPERIOR  
 ) COURT  
 ) Docket No. S-  
 vs )  
 DUN & BRADSTREET, INC. ) 326-77Wnc

**JUDGMENT**

This action came on for trial before the Court and a jury, Thomas L. Hayes presiding, and the issues having been duly tried and the jury on April 10, 1980, having rendered a verdict for the plaintiff to recover of the defendant damages in the amount of \$350,000.00,

It is ORDERED and ADJUDGED that the plaintiff recover of the defendant the sum of \$350,000.00 and its costs of action.

Dated at Montpelier, Vermont this 21st day of April, 1980.

Thomas L. Hayes

Hon. Thomas L. Hayes

Willis C. Bragg

Hon. Willis C. Bragg

Patricia B. Jensen

Hon. Patricia B. Jensen

STATE OF VERMONT  
WASHINGTON COUNTY ss.

GREENMOSS BUILDERS

V

DUN & BRADSTREET

SUPERIOR COURT  
WASHINGTON  
COUNTY  
DOCKET NO. S326-  
77WnC

**ORDER**

The above-entitled cause came on for hearing before the Washington Superior Court on defendant's Motion for: Judgment for the defendant notwithstanding the verdict; for judgment on the issue of punitive damages notwithstanding the verdict; for judgment on the issue of a compensatory damages notwithstanding the verdict; and for a new trial of all issues in the above-captioned matter.

The Court has reviewed the instructions given the jury in this cause, and memoranda submitted, and has considered the evidence of record, the verdict rendered by the jury and the applicable law.

We are persuaded that the evidence is sufficient as a matter of law to create issues of fact for the jury with respect to both liability and damages. Therefore, all motions for judgment notwithstanding the verdict must be denied.

The more troublesome question is whether defendant should prevail on its motion for a new trial.

The Court made it clear in its charge that the jury was not *compelled* to award substantial damages absent actual proof of the same. However, other language

in the charge may have misled the jury to believe that damages were presumed in some amount in the case.

The United States Supreme Court held in *Gertz v. Robert Welch*, 418, U.S. 324:

"The States, however, may not permit recovery of presumed or punitive damages when liability is not based on knowledge of falsity or reckless disregard for the truth, and the private defamation plaintiff who establishes liability under a less demanding standard than the New York Times test may recover compensation only for actual injury."

Reading the charge as a whole, we are persuaded that the charge permitted the jury to believe that damages could be awarded to the Plaintiff for defamation absent proof of damages and absent a showing of knowledge of falsity or reckless disregard for the truth by the Defendant.

Commentators are in wide disagreement as to the application of *Gertz* in connection with non-media cases. Because of the Court's dissatisfaction with its charge and its conviction that the interests of justice require a new trial, the motion for the Defendant in this regard is granted.

In view of the foregoing, it is hereby ORDERED and ADJUDGED:

1. That all motions of the Defendant for judgment notwithstanding the verdict are DENIED.
2. That Defendant's motion for a new trial on all issues is GRANTED.

Dated at Montpelier, County of Washington, this 19th day of October 1980.

Thomas L. Hayes  
Superior Judge

Willis C. Bragg  
Assistant Judge

Patricia B. Jensen  
Assistant Judge

STATE OF VERMONT  
WASHINGTON COUNTY, SS.

GREENMOSS BUILDERS, )  
INC. ) WASHINGTON  
 ) SUPERIOR  
V. ) COURT  
 ) DOCKET NO.  
DUN & BRADSTREET ) S326-77 WnC

**ORDER**

The above-entitled cause came on before the Washington Superior Court on Plaintiff's Petition for Permission to Appeal, which petition was opposed by the Defendant. However, the Defendant requested that, if this Court grants permission for an interlocutory appeal, that said appeal include certain questions specified by the Defendant.

The Court finds, after considering the petition and the alternative requests made by the Defendant, that there exist controlling questions of law as to which there is substantial ground for difference of opinion concerning the Court's October 19, 1980 Order granting Defendant's motion for a new trial on all issues. The Court also finds that an immediate appeal from the Order may materially advance the ultimate termination of the litigation. Accordingly, it is hereby ordered and adjudged that the Plaintiff's Motion for Permission to Appeal and the alternative requests of the Defendant are granted to the extent set forth below. The Clerk shall proceed as provided in Rules 3e and 5b (3) of the Vermont Rules of Appellate Procedure.

The controlling questions of law are as follows:

1. Did the Court err in granting Defendant's motion for a new trial on all issues?
2. If the answer to the previous question is in the affirmative, should the Court have entered judgment on the verdict?
3. If the answer to Question No. 1 is in the affirmative, should the Court have ordered a new trial on:
  - a) damages only?;
  - b) compensatory damages only?;
  - c) punitive damages only?
4. Did the Court err in denying all motions of the Defendant for judgment notwithstanding the verdict?
5. If the answer to the previous question is in the affirmative, should the Court have:
  - a) granted Defendant's Motion to enter judgment for the Defendant on the issue of punitive damages, notwithstanding the verdict?;
  - b) granted the motion of the Defendant for judgment on the issue of compensatory damages, notwithstanding the verdict?;
  - c) granted judgment for the Defendant on all issues?

Dated this 26th day of April, 1981.

Thomas L. Hayes  
Superior Judge

Willis C. Bragg  
Assistant Judge

Patricia B. Jensen  
Assistant Judge

**SUPREME COURT OF THE STATE  
OF VERMONT**

**ENTRY ORDER**

**SUPREME COURT DOCKET NO. 173-81  
NOVEMBER TERM, 1982**

**APPEALED FROM:**

Greenmoss Builders, Inc. } Washington Superior Court  
v. {  
Dun & Bradstreet, Inc. } DOCKET NO. S326-  
77WnC

In the above entitled cause the Clerk will enter:

*Certified questions one and two are answered in the affirmative; certified questions three, parts (a) through (c), and four are answered in the negative.*

**FOR THE COURT:**

William C. Hill  
WILLIAM C. HILL,  
Associate Justice

**Concurring:**

Albert W. Barney  
ALBERT W. BARNEY,  
Chief Justice

Franklin S. Billings, Jr.  
FRANKLIN S. BILLINGS, JR.,  
Associate Justice

Wynn Underwood  
WYNN UNDERWOOD,  
Associate Justice

Louis P. Peck  
LOUIS P. PECK,  
Associate Justice

## No. 173-81

Greenmoss Builders, Inc. Supreme Court

v.

On Appeal from  
Washington Superior  
Court

Dun &amp; Bradstreet, Inc. November Term, 1982

Thomas L. Hayes, J.  
 Villa & Heilmann, Burlington, for plaintiff-appellant  
 Young & Monte, Northfield, for defendant-appellee

PRESENT: Barney, C.J., Billings, Hill, Underwood  
 and Peck, JJ.

HILL, J. Plaintiff, a residential and commercial building contractor, brought this defamation action against defendant as a result of an erroneous credit report issued to defendant's subscribers (plaintiff's creditors). The credit report alleged that plaintiff had filed a voluntary petition in bankruptcy and, in addition, grossly misrepresented plaintiff's assets and liabilities. The false nature of the report's allegations has never been disputed.

In its complaint, plaintiff asserted that the consequences of defendant's report, which it insisted was published with reckless disregard for truth and accuracy, were a damaged business reputation, loss of company profits, and loss of money expended to correct the error. In response, defendant claimed both a constitutional and common law qualified privilege against defamation actions, and on that basis contended that since its report was published in good faith, it could not be held liable.

After a trial by jury, a verdict was returned in favor of plaintiff for \$50,000 in compensatory or actual damages, and \$300,000 in punitive damages. Thereafter, defendant filed timely motions for judgment notwithstanding the verdict, V.R.C.P. 50, and for new trial, V.R.C.P. 59, on the issues of liability and damages. The trial court, persuaded that the evidence was sufficient as a matter of law to create issues of fact for the jury as to both liability and damages, denied defendant's motions for judgment notwithstanding the verdict. Upon reviewing its jury instructions, however, the trial court concluded that it had incorrectly charged those standards of liability enunciated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and granted defendant's motions for new trial on all issues.

This action is before us pursuant to an Interlocutory Order by the Washington Superior Court, V.R.A.P. 5(b)(1), certifying five questions of law for our resolution. (1) Did the trial court err in granting defendant's motion for a new trial on all issues? (2) If the answer to the first question is in the affirmative, should the court have entered judgment on the verdict? (3) If the answer to the first question is in the affirmative, should the court have ordered a new trial on: (a) damages only? (b) compensatory damages only? (c) punitive damages only? (4) Did the court err in denying all motions of the defendant for judgment notwithstanding the verdict? (5) If the answer to the fourth question is in the affirmative, should the court have: (a) granted defendant's motion to enter judgment for the defendant on the issue of punitive damages, notwithstanding the verdict? (b) granted the motion of the defendant for judgment on the issue of compensatory damages, notwithstanding the verdict? (c) granted judgment for the defendant on all issues? In light of

our disposition of the first four questions, we need not address the fifth question.

We begin with a review of the record. Defendant operates a business in which factual and financial reports about individual business enterprises are issued exclusively to subscribers of defendant's service. These subscribers, usually creditors of the reported enterprises, may contract for "continuous service reports" which enable them to receive all report updates about a particular business over a year's time from the subscriber's initial inquiry. The reports are based on information solicited from the business itself, the business' banking and credit sources, from trade suppliers, and from public records such as annual reports filed with the Secretary of State and reports of bankruptcy petitions.

On or about July 26, 1976, plaintiff's president met with a representative of its principal creditor, a bank, to discuss the possibility of future financing. During the meeting, the bank's representative informed plaintiff's president that he had just received a credit report issued by defendant indicating that plaintiff had recently filed a voluntary petition in bankruptcy. Plaintiff's president testified that he was both shocked and confused when confronted with the report, since plaintiff had never filed such a petition and, at the time the report was published, plaintiff's business was steadily expanding. In fact, plaintiff's president later testified that prior to the issuance of the credit report, plaintiff had never suffered a major economic reversal and its financial condition was sound. Nevertheless, despite the bank representative's trial testimony that he never really believed the report, the bank put off any future consideration of credit to plaintiff until the

discrepancy was cleared up. The bank later terminated plaintiff's credit allegedly for reasons unrelated to the report.

Plaintiff's president immediately contacted defendant's regional office in Manchester, New Hampshire. He explained the error to defendant's regional supervisor and requested, in addition to an immediate correction, a list of those creditors who had received the false reports in order that they might be reassured of plaintiff's solvency. Defendant's representative stated that the matter would be looked into, but refused to divulge to plaintiff's president the names of the creditors who had received the report.

The basis of the error was established at trial: a former employee of plaintiff, and not plaintiff, had filed a voluntary petition in bankruptcy. Defendant's employee, a seventeen year old high school student, paid \$200 annually to review Vermont's bankruptcy petitions, had inadvertently attributed the former employee's bankruptcy petition to plaintiff itself, and reported the information as such to defendant. A representative of defendant testified that prior to the issuance of a credit report indicating a bankrupt business, it was defendant's routine practice first to check the report's accuracy with the business itself. No pre-publication verification was ever attempted in the present case.

On or about August 3, 1976, having satisfied itself that its credit report on plaintiff was wrong, defendant issued a corrective notice to the five subscribers who had received the initial report. In substance, the corrective notice stated that it was a former employee of plaintiff, not plaintiff itself, who had filed the petition in bankruptcy, and that plaintiff "continued in busi-

ness as usual." Plaintiff informed defendant that it was dissatisfied with the corrective notice, since it implied that the initial mistake was attributable to plaintiff, not defendant. Plaintiff again demanded a list of subscribers who had seen the report, but its request was once again denied.

Thereafter, plaintiff refused to provide defendant with any further financial data, and requested that defendant inform anyone seeking such data that it was being withheld pending the outcome of plaintiff's defamation action against defendant. Instead, defendant issued plaintiff a "blank rating," indicating that plaintiff's circumstances were "difficult to classify" within defendant's rating system, and such information was distributed to those creditors who requested a current indication of plaintiff's financial status. A short while later, plaintiff commenced its defamation action.

## I.

In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the United States Supreme Court held that a "public official" was prohibited "from recovering damages for a defamatory falsehood relating to his official conduct unless he [or she] proves that the statement was made with 'actual malice,' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80; *Burns v. Times Argus Association*, 139 Vt. 381, 384, 430 A.2d 773, 775 (1981). Three years later, the media protection established in *New York Times* was extended to cover defamatory falsehoods published about "public figures." *Curtis Publishing Company v. Butts*, 388 U.S. 130, 155 (1967). In *Gertz v. Robert Welch, Inc.*, *supra*, the Supreme Court, in the last major pronouncement of protections afforded the media in defamation actions,

held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a *private individual*." *Id.* at 347 (emphasis added). Although *Gertz* permitted a "private individual" to recover actual damages, presumed or punitive damages were not permitted absent proof of the *New York Times* standard "of knowledge of falsity or reckless disregard for the truth." *Id.* at 348.

The critical issue underlying the certified questions presented, a matter of first impression for this Court, is whether the First and Fourteenth Amendments to the United States Constitution require that the qualified protections afforded the media in "private" defamation actions, as set forth in *Gertz*, be extended to actions involving nonmedia defendants. Although the issue has never been decided by the United States Supreme Court, see *Hutchinson v. Proxmire*, 443 U.S. 111, 133 n.16 (1979), it has been addressed in a number of state courts. See, e.g., *Denny v. Mertz*, 106 Wis. 2d 636, 318 N.W.2d 141 (1982); *Rowe v. Metz*, 195 Colo. 424, 579 P.2d 83 (1978); *Harley Davidson Motor-sports, Inc. v. Markley*, 279 Or. 361, 568 P.2d 1359 (1977); *Jacron Sales, Inc. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1975). Since the basis of the trial court's decision to grant a new trial was its allegedly faulty jury instruction regarding the *Gertz* standards of liability and damages, a threshold determination as to *Gertz*'s applicability to the facts of this case is crucial.

In support of its claim that *Gertz*, as a matter of federal constitutional law, should apply to nonmedia as well as media defendants, defendant asserts that the former have equally compelling First Amendment

rights worthy of constitutional protection, and as such it questions the logic of affording the press exclusive immunity from the consequences of defamation. Additionally, defendant insists that distinctions between media and other information disseminating defendants are quite often illusory, and concludes that it should be considered a "publisher or broadcaster" for purposes of First Amendment protection.

We are fully aware that in certain instances the distinction between media and nonmedia defendants may be difficult to draw. However, no such difficulty is presented with credit reporting agencies, which are in the business of selling financial information to a limited number of subscribers who have paid substantial fees for their services. As a result of a contractual arrangement between defendant and its subscribers, the procured information is to be kept confidential. There is a clear distinction between a publication which disseminates news for public consumption and one which provides specialized information to a selective, finite audience. We therefore reject, as have the majority of circuit courts, the assertion that credit agencies such as defendant are the type of media worthy of First Amendment protection as contemplated by *New York Times* and its progeny. See, e.g., *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829, 833 (8th Cir. 1976); *Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25, 29 (5th Cir.), cert. denied, 415 U.S. 985 (1973); *Oberman v. Dun & Bradstreet, Inc.*, 460 F.2d 1381, 1383 (7th Cir. 1972); *Kansas Elec. Supply Co., Inc. v. Dun & Bradstreet, Inc.*, 448 F.2d 647, 649 (10th Cir. 1971), cert. denied, 405 U.S. 1026 (1972); *Grove v. Dun & Bradstreet, Inc.*, 438 F.2d 433, 437 (3d Cir.), cert. denied, 404 U.S. 898 (1971).

Moreover, in carefully surveying the decisions of those jurisdictions which have specifically addressed the issue of whether *Gertz* should be applied to nonmedia defendants, we note that the majority have refused such an extension. Although we are not bound by these decisions, their reasoning is both persuasive and compelling. In nonmedia defamation actions, "[t]he crucial elements . . . which brought the United States Supreme Court into the field of defamation law are missing. There is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press." *Harley Davidson Motorsports, Inc. v. Markley, supra*, 279 Or. at 366, 568 P.2d at 1363. Consequently, the Supreme Court of Oregon concluded:

Because a private individual's right to recover for libel has been made more difficult in situations in which his interests have been at least partially outweighed by important constitutional values, it does not follow, for obvious reasons, that his recovery should be made more difficult in situations in which no such constitutional values are involved merely for the sake of securing symmetry of treatment of defendants. It is our conclusion that *Gertz* does not require application of the constitutional privilege to actions of defamation between private parties insofar as the issues raised here are concerned.

*Id.* at 370-71, 568 P.2d at 1365. For other cases holding *Gertz* inapplicable to nonmedia defamation actions, see generally *Denny v. Mertz, supra*; *Fleming v. Moore*, 221 Va. 884, 275 S.E.2d 632 (1981); *Schomer v. Smidt*, 113 Cal. App. 3d 828, 170 Cal. Rptr. 662 (1980);

*Gengler v. Phelps*, 92 N.M. 465, 589 P.2d 1056 (1979); *Rowe v. Metz*, *supra*; *Retail Credit Company v. Russell*, 234 Ga. 765, 218 S.E.2d 54 (1975); *cf. Jacron Sales Company, Inc. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1975); Restatement (Second) Torts § 480B, Comment e.

In light of the above, we are convinced that the balance must be struck in favor of the private plaintiff defamed by a nonmedia defendant. "Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues . . . ." *Gertz v. Robert Welch, Inc.*, *supra*, 418 U.S. at 340 (quoting *New York Times v. Sullivan*, *supra*, 376 U.S. at 270). Accordingly, we hold that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions.

## II.

In the alternative, defendant contends that in the absence of a constitutional mandate, this Court should nevertheless adopt *Gertz* in the interests of fairness, simplicity and clarity in our state common law. Defendant's argument is based on the fear that without a heightened standard of protection in defamation actions, individuals will withdraw from, rather than pay the price of entry into, "the marketplace of ideas." Moreover, defendant insists that our common law, like the common law in the vast majority of other jurisdictions, see *Prosser, Law of Torts*, c. 19, § 115 (4th ed. 1971) and cases cited in 30 A.L.R. 2d 776 (1953), has already recognized, at least implicitly, a qualified common law privilege for credit reporting agencies. We disagree.

In *Nott v. Stoddard*, 38 Vt. 25 (1865), this Court recognized that there are certain exceptions to our general common law rule that malice will be presumed when words are in themselves defamatory and thus actionable per se:

Cases of giving the character of servants, confidential advice for some legitimate purpose, communications to persons who ask for information and have a right or interest to know, are of this character. In such cases malice must be proved by extrinsic evidence, or inferred as a matter of fact by the jury from the circumstances.

*Id.* at 32. Although we have never expressly denied credit reporting agencies a qualified privilege, we have done so implicitly: "[I]f the words impute some quality, the natural tendency of which is to impair the plaintiff's professional or business character, as insolvency to a merchant, . . . they are actionable . . ." *Darling v. Clement*, 69 Vt. 292, 300, 37 A. 779, 781 (1897) (citations omitted).

In balancing the equities between a credit reporting agency and the individual it has defamed through a false credit report, we note that "[a]n individual living in a world more and more dominated by large commercial entities is less able to bear the burden of the consequences of a false credit or character report than the agency in the business of selling these reports." *Retail Credit Company v. Russel*, *supra*, 234 Ga. at 770, 218 S.E.2d at 58. In light of the fact that our common law has never recognized a qualified privilege against defamation actions for credit reporting agencies, and given the absence of compelling policy reasons to do so now, we decline to adopt the rules set forth in *Gertz* as part of our common law.

### III.

With regard to the question of damages, we note that "the availability of both general and punitive damages in libel actions has not been rejected as a matter of constitutional law." *Michlin v. Roberts*, 132 Vt. 154, 163, 318 A.2d 163, 169 (1974). "When the defamation action is actionable *per se* the plaintiff can recover general damages without proof of loss or injury, which is conclusively presumed to result from the defamation, but he is not required to rely solely upon the implications that are applicable and may present any evidence of competent character that is authorized by his pleadings, for the purpose of showing the extent of injury and the amount of the compensation that should be awarded." *Lancour v. Herald & Globe Association*, 112 Vt. 471, 475, 28 A.2d 396, 399 (1942) (citing *Nott v. Stoddard*, *supra*, 38 Vt. at 30).

Likewise, in accordance with this Court's belief that "[p]unitive damages are awarded to 'stamp the condemnation of the jury upon the acts of defendant on account of their malicious character,'" *Pezzano v. Bonneau*, 133 Vt. 88, 92, 329 A.2d 659, 661 (1974) (quoting *Goldsmith's Admr. v. Joy*, 61 Vt. 488, 500, 17 A. 1010, 1014 (1889)), their availability in defamation actions involving "malice" has never been questioned. *Lancour v. Herald & Globe Association*, *supra*, 112 Vt. at 478, 28 A.2d at 401 (citing *Smith v. Moore*, 74 Vt. 81, 86, 52 A. 320, 321 (1901)). Although each case stands upon its own facts, *Woodhouse v. Woodhouse*, 99 Vt. 91, 154, 130 A. 758, 788 (1925), we have indicated that "malice may be shown by conduct manifesting personal ill will or carried out under circumstances evidencing insult or oppression, or even by conduct showing a reckless or wanton disregard of one's rights." *Shortle v. Central Vermont Public Service*

*Corporation*, 137 Vt. 32, 33, 399 A.2d 517, 518 (1979) (citing *Sparrow v. Vermont Savings Bank*, 95 Vt. 29, 33, 112 A. 205, 207 (1921)); *Lancour v. Herald & Globe Association*, *supra*, 112 Vt. at 482, 28 A.2d at 402; *Woodhouse v. Woodhouse*, *supra*, 99 Vt. at 155, 130 A. at 788.

Since "punitive damages are incapable of precise determination, their assessment is 'largely discretionary with the jury,'" *Lanfranconi v. Tidewater Oil Company*, 376 F.2d 91, 96 (2nd Cir. 1967) (quoting *Gray v. Janicki*, 118 Vt. 49, 52, 99 A.2d 707, 709 (1953)), and said assessment will not be interfered with unless "manifestly and grossly excessive." *Pezzano v. Bonneau*, *supra*, 133 Vt. at 91, 329 A.2d at 661 (quoting *Gray v. Janicki*, *supra*, 118 Vt. at 52, 99 A.2d at 709). We have cautioned, however, that though "the verdict may be considerably more or less than, in the judgment of the court, it ought to have been, still it will decline to interfere unless the amount is so great or small as to indicate that it is the result of perverted judgment, accident or gross mistake." *Woodhouse v. Woodhouse*, *supra*, 99 Vt. at 157, 130 A. at 789.

### IV.

Guided by the rulings and principles outlined above, we turn to the certified questions raised by both parties regarding the propriety of the trial court's refusal to set aside the jury verdicts, V.R.C.P. 50, as well as its decision to grant a new trial on all issues. V.R.C.P. 59. As a basis for its motions, defendant argued that the verdicts were not supported by the evidence, in that the *Gertz* standards had not been met, that they were the product of passion and not reason, and that they were clearly excessive. In its order, the trial court noted that it had reviewed the jury instructions, all

memoranda submitted, the evidence of record, the verdict rendered by the jury and the applicable law. Persuaded that the evidence was "sufficient as a matter of law to create issues of fact for the jury with respect to both liability and damages," the trial court denied defendant's motions for judgment notwithstanding the verdict.

Defendant contends that the trial court abused its discretion in denying defendant's motions to set aside the verdicts. A careful review of the record discloses that defendant failed to renew, at the close of all the evidence, its earlier motions for a directed verdict on the issues of liability and compensatory damages. Thus, defendant's motions for judgment notwithstanding the verdict as to these two issues were properly denied. *Proctor Trust Company v. Upper Valley Press, Inc.*, 137 Vt. 346, 349, 405 A.2d 1221, 1223 (1979); *Palmissano v. Townsend*, 136 Vt. 372, 375, 392 A.2d 393, 395 (1978); *Houghton v. Leinwohl*, 135 Vt. 380, 381-82, 376 A.2d 733, 735-36 (1977); V.R.C.P. 50(b).

In determining whether the trial court abused its discretion by refusing to set aside the punitive damages award on the grounds that it was excessive, this Court is "bound to indulge every reasonable presumption in favor of the ruling below, bearing in mind that the trial court was in a better position to determine the question." *Towle v. St. Albans Publishing Company, Inc.*, 122 Vt. 134, 142, 165 A.2d 363, 368 (1960) (citing *Lancour v. Herald & Globe Association*, *supra*, 112 Vt. at 483, 28 A.2d at 403). In short, defendant must show that the ruling is clearly untenable and without any reasonable basis of support in the record. *Id.* (citing *Stone v. Briggs*, 112 Vt. 410, 415, 26 A.2d

828, 831 (1942)); *Dashnow v. Myers*, 121 Vt. 273, 279, 155 A.2d 859, 864 (1959).

We are not persuaded that the trial court abused its discretion in denying defendant's motion to set aside the verdict as to the issue of punitive damages.<sup>1</sup> There was ample evidence in the record to enable the jury to conclude that defendant's conduct was insulting, reckless, and in total disregard of plaintiff's rights. *Shortle v. Central Vermont Public Service Corporation*, *supra*, 137 Vt. at 33, 399 A.2d at 518. As noted above, "the size of the verdict alone does not indicate passion or prejudice by the jury." *Pezzano v. Bonneau*, *supra*, 133 Vt. at 91, 329 A.2d at 661 (citing *Gray v. Janicki*, *supra*, 118 Vt. at 51, 99 A.2d at 709). We are not convinced that the trial court abused its discretion in denying defendant's motions for judgment notwithstanding the verdict on the issue of punitive damages. Accordingly, the fourth certified question for review, whether the trial court erred in denying all motions of defendant for judgment notwithstanding the verdict, is answered in the negative.

In the second part of its order, the trial court, persuaded that its jury instructions "permitted the jury to believe that damages could be awarded to the [p]laintiff for defamation absent proof of damages and absent a showing of a knowledge of falsity or reckless

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<sup>1</sup> In its brief, defendant contends for the first time on appeal that in the absence of evidence of corporate involvement, punitive damages may not be assessed. "[W]e have repeatedly held that issues not raised below, even those having a constitutional dimension, will not be considered when presented for the first time on appeal." *State v. Patnaude*, 140 Vt. 361, 368, 438 A.2d 402, 404 (1981) (citing *State v. Prue*, 138 Vt. 331, 331-32, 415 A.2d 234, 234 (1980)).

disregard for the truth by the [d]efendant," granted defendant's motion for new trial on all issues. That is, defendant's motion for new trial was granted on the basis of the trial court's belief that its charge to the jury, insofar as it related to the *Gertz* standards of liability, was confusing. In view of the fact that our decision today holds *Gertz* totally inapplicable to the present case, we find the error harmless. In fact, we have carefully reviewed the jury instructions, and in addition to being properly charged in line with our common law rules as to liability and damages, defendant was afforded a common law qualified privilege against credit report agencies along with the ill-charged constitutional privilege outlined in *Gertz*. In short, defendant has nothing to complain about, since it received two beneficial charges to which it was not entitled.

*Certified questions one and two are answered in the affirmative; certified questions three, parts (a) through (c), and four are answered in the negative.*

**FOR THE COURT:**

WILLIAM C. HILL  
Associate Justice

(5)

No. 83-18

Office of the Clerk  
R U L E D

DEC 22 1983

ALEXANDER L. STEVENS

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1983

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**DUN & BRADSTREET, INC.,**  
*Petitioner,*  
v.

**GREENMOSS BUILDERS, INC.,**  
*Respondent.*

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**On Writ of Certiorari to the  
Supreme Court of the State of Vermont**

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**BRIEF OF THE WASHINGTON POST,  
AMICUS CURIAE, IN SUPPORT OF REVERSAL**

---

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IN THE  
Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-18

DUN & BRADSTREET, INC.,  
*Petitioner*,  
v.GREENMOSS BUILDERS, INC.,  
*Respondent*.On Writ of Certiorari to the  
Supreme Court of the State of VermontBRIEF OF THE WASHINGTON POST,  
AMICUS CURIAE, IN SUPPORT OF REVERSAL

The Washington Post submits this brief as *amicus curiae* in support of petitioner's claim that the presumed and punitive damage awards against it violate the First and Fourteenth Amendments to the Constitution. All parties to this action have given their written consent to the filing of this brief pursuant to Rule 36.2 of the Rules of this Court. Copies of the letters of consent have been filed with the clerk.

### INTEREST OF THE AMICUS

*Amicus curiae*, The Washington Post, publishes a newspaper of general circulation in the Washington, D.C. metropolitan area.<sup>1</sup> It has been, and is, involved in a number of libel cases in which punitive and presumed damages are sought, and one case in which a plaintiff's verdict (including punitive damages) was returned. (The trial judge entered judgment notwithstanding the verdict in the Post's favor, and the case is on appeal. See p. 14, *infra*.) Because of its involvement in libel litigation in which punitive and presumed damages are sought, the Post has an interest in the development of the legal principles governing such claims.

### SUMMARY OF ARGUMENT

Both the Vermont Supreme Court and the petitioner in this case have assumed that punitive and presumed damages may be awarded against the press upon a showing of "actual malice" under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and proceeded to pose the question whether nonmedia defendants are entitled to the same protection. In fact, neither *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), nor any other decision of this Court, estab-

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<sup>1</sup> The Post is a division of the Washington Post Company, which has the following subsidiaries or affiliates (excluding wholly owned subsidiaries): Bowater Mersey Company Ltd., Robinson Terminal Warehouse Corp., Los Angeles Times-Washington Post News Service, International Herald Tribune, S.A., Bear Island Paper Company (a limited partnership), The Detroit Cellular Telephone Company (a general partnership), and The Washington-Baltimore Cellular Telephone Company (a general partnership). This disclosure is made pursuant to Rule 28.1 of the Rules of this Court.

lishes a firm rule for punitive or presumed damages against the press. *Gertz* did not hold, or state by way of dictum, that punitive or presumed damages may be awarded against any defendant upon a showing of actual malice. Indeed, there was no separate punitive damage award at all in *Gertz*, and the case presented no occasion for the Court to decide whether punitive damages may ever be awarded against the press or any other defendant.

*Gertz*, in short, left open the question whether punitive or presumed damages may ever be awarded in a defamation case against the press or against a member of the public. The issue in this case, then, is not simply whether there is a basis for distinguishing between media and nonmedia defendants. The issue is whether Dun & Bradstreet, a company that published certain financial and credit information about another company, is entitled to the minimum protection it has asked for—namely, the requirement that actual malice be shown before punitive and presumed damages are awarded against it. *Amicus* agrees that to deny Dun & Bradstreet that minimum protection, and to uphold punitive damages on the facts of this case, would violate the First Amendment.

Dun & Bradstreet has not asked for protection beyond the actual malice standard, and there is therefore no occasion for the Court to consider whether, and under what circumstances, additional protection may be appropriate. It is *amicus'* position, however, that in an appropriate case this Court should hold that punitive and presumed damages may never be awarded in a defamation action. Punitive damages generally, and the unique remedy of presumed damages in defamation cases, are anomalies of the law. Committed largely to the uncontrolled discretion of

juries, these awards often bear no relationship to actual harm done. They can be used to punish unpopular defendants; they encourage unnecessary litigation; and they chill desirable as well as undesirable conduct.

In *Gertz* the Court expressly recognized that these concerns have special force in defamation cases. The Court stated further that the states have "no substantial interest in securing for [defamation] plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." 418 U.S. at 349. The logic of *Gertz* and of the First Amendment itself points ineluctably to the conclusion that punitive and presumed damages may never be awarded in defamation cases.

Recent judicial experience with punitive damages in defamation cases underscores the appropriateness of such a ruling. Massive punitive damage awards of over a million dollars have become commonplace. The fear of these devastating verdicts has chilled the exercise of First Amendment freedoms and threatened the very existence of media outlets ill-equipped to absorb them.

This case does not require the Court to decide whether punitive or presumed damages may ever be awarded against a media or nonmedia defendant, nor does it require the Court to decide whether there are some categories of cases in which punitive damages are inappropriate. The Court need only decide whether Dun & Bradstreet is entitled to the minimum protection it has sought in the case—the actual malice standard. The Court should decide that question in the affirmative, and leave the remaining questions concerning punitive and presumed damages to a case in which they are squarely presented and fully briefed.

## ARGUMENT

### I. *GERTZ v. ROBERT WELCH, INC.* LEFT OPEN THE QUESTION WHETHER PUNITIVE AND PRESUMED DAMAGES MAY BE AWARDED IN A DEFAMATION CASE

The Vermont Supreme Court saw the "critical issue" in this case as whether the "qualified protections afforded the media in 'private' defamation actions, as set forth in *Gertz*, [should] be extended to actions involving nonmedia defendants." J. App. 37. Likewise, the petitioner has framed the issue before the Court as "whether the First Amendment's limitations on the award of presumed and punitive damages for libel, first enunciated in *Gertz v. Robert Welch, Inc.*, . . . apply to 'nonmedia' defendants." Petition i. This framing of the issue is inadequate. It supposes that the Court has already "enunciated" a rule for media defendants, and that the only remaining question is whether nonmedia defendants are entitled to the same rule. There is no settled rule, however: *Gertz* did not resolve the question whether punitive or presumed damages may ever be awarded against a media defendant. This case therefore cannot be decided simply by asking whether there is a basis for distinguishing between media and nonmedia defendants.

*Gertz* did not hold that presumed and punitive damages may be awarded against a media defendant in favor of a private libel plaintiff upon a showing of actual malice—that is, knowledge of falsity or reckless disregard for the truth. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). Nor did the Court in *Gertz* make that pronouncement by way of dictum. It noted only that presumed and punitive damages *cannot* be recovered by a private libel plaintiff when the private plaintiff has *not* even shown

actual malice under *New York Times*: "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." 418 U.S. at 349. That is all the Court had to decide to resolve the damage issue in *Gertz*, for the district court and court of appeals agreed there was no showing of actual malice in *Gertz*, and this Court did not disturb that finding. Whether a private (or public) figure libel plaintiff can recover presumed or punitive damages when actual malice is proven is a question that was not before the Court in *Gertz* and which properly was not decided.

Although many lower courts have found in *Gertz*'s double negative the implication that punitive damages are permitted upon a showing of actual malice, they recognize that the Court has left this question open. *See, e.g., Maheu v. Hughes Tool Co.*, 569 F.2d 459, 478 (9th Cir. 1978); *Buckley v. Littell*, 539 F.2d 822, 897 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977); *Davis v. Schuchat*, 510 F.2d 731 (D.C. Cir. 1975); *Restatement (Second) of Torts* § 621, comment d (1977). This Court itself seems implicitly to have acknowledged that the question remains open, at least with respect to public figure plaintiffs, when in *Smith v. Wade*, \_\_\_\_ U.S. \_\_\_, 103 S.Ct. 1625, 1639 n.19 (1983), it declined to "intimate [a] view on any First Amendment issues" raised by such opinions.

*Gertz* would hardly have been an appropriate case in which to resolve all issues pertaining to punitive and presumed damages in defamation cases. The parties did not brief the issue of punitive or presumed damages, and there was no separate award of punitive damages in the case.

In *Gertz*, the Court rejected the view of the plurality in *Rosenblom v. Metromedia, Inc.*, 403 U.S. 29 (1971), that even a private figure must show actual malice in challenging a publication on a matter of public interest. A private individual, the Court held, is required by the Constitution only to prove fault by the publisher. That decided the basic issue before the Court, but the Court did not stop there. It recognized that the logic of its decision, while dictating a lower standard of liability for private figures, also required limitations on the types of damages recoverable in libel actions—specifically, presumed damages and punitive damages. The Court opted for a less rigorous standard of liability for private individuals "in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation." 418 U.S. at 348-49. The Court added, however:

But this countervailing state interest extends no further than compensation for actual injury. For the reasons stated below, we hold that the States may not permit recovery of presumed or punitive damages, *at least* when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

*Id.* at 349 (emphasis added).

The Court was careful not to state that presumed and punitive damages may be recovered when liability is based on a showing of actual malice; it simply stated that *at least* when, as in *Gertz*, there is no proof of actual malice, there can be no presumed or punitive damages. The Court, in short, cautioned that the rationale for permitting the recovery of actual damages upon a showing of fault did not extend

to the recovery of presumed and punitive damages. But the Court did not purport to define what circumstances, if any, would warrant the imposition of presumed or punitive damages.

While *Gertz* cannot be read to resolve the question whether punitive and presumed damages may be recovered, the reasoning of the Court's opinion suggests strongly that punitive and presumed damages should never be awarded. On the subject of presumed damages, the Court said:

The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.

418 U.S. at 349.

The Court's concern about the impact of punitive damages upon freedom of expression was made equally clear:

We also find no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation. In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable

amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the State interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.

418 U.S. at 350.

The dangers of presumed and punitive damages could not have been stated more clearly. Both inhibit the vigorous exercise of First Amendment freedoms by permitting recovery of massive damage awards unrelated to actual injury. Both invite juries to punish unpopular speakers and the expression of unpopular views. Indeed, punitive damages in defamation cases are expressly designed to punish the exercise of free speech. There is certainly a serious question whether damage awards fraught with these dangers can be squared with the Constitutional guarantees of free speech and free press.

## II. PUNITIVE AND PRESUMED DAMAGES FOR DEFAMATION VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS

Punitive damages are a disfavored anomaly in any context. They are unfaithful to the "fundamental premise of our legal system . . . that damages are awarded to *compensate* the victim." *Smith v. Wade*,

103 S.Ct. at 1641 (Rehnquist, J., dissenting). They can be used to punish unpopular defendants. *Id.*; see *Electrical Workers v. Foust*, 442 U.S. 42, 50-51 n.14 (1979). Because they are unpredictable and often enormous, they encourage unnecessary litigation as a means to gratuitous jackpots. And the threat of expensive litigation and arbitrary awards can chill not only undesirable but also "desirable conduct." *Smith v. Wade*, 103 S.Ct. at 1642 (Rehnquist, J., dissenting).

These concerns have special force in the area of free speech. It is a keystone of First Amendment jurisprudence that speech must not be "chilled" because of our "profound national commitment to . . . uninhibited, robust, and wide-open" debate. *New York Times Co. v. Sullivan*, 376 U.S. at 270. Yet the very purpose, and the undeniable effect, of punitive damage awards in defamation cases is to punish and deter speech. Punitive damages and the First Amendment are thus fundamentally at cross-purposes.

It is no answer to this conflict to say that punitive damage awards will deter only unprotected speech: "any system that punishes certain speech is likely to induce self-censorship by those who would otherwise exercise their Constitutional freedom." *Rosenbloom v. Metromedia*, 403 U.S. at 64-65 (Harlan, J., dissenting). Those with lawful messages to convey "steer far wider of the unlawful zone" because the magnitude of the penalty attached to unprotected speech is so uncertain and potentially so great. *Speiser v. Randall*, 357 U.S. 513, 526 (1958); see *Rosenbloom*, 403 U.S. at 82 (Marshall, J., dissenting) ("the size of the potential judgment that may be rendered against the press must be the most significant factor in producing self-censorship"). In awarding

punitive damages, courts necessarily endorse the chilling of First Amendment liberties.

As noted above, this Court in *Gertz* expressly recognized the chilling effect of punitive and presumed damage awards in defamation cases. See pp. 8-9, *supra*. And *Gertz* is only the most recent of a number of opinions in which the Justices of this Court have noted that these awards are constitutionally suspect. In *New York Times Co. v. Sullivan*, the Court commented that "the pall of fear and timidity imposed [by large damage awards] . . . is an atmosphere in which the First Amendment freedoms cannot survive." 376 U.S. at 278. Justice Black wrote in concurrence that "huge verdicts . . . threaten the very existence" of a virile press. *Id.* at 294. In *Rosenbloom*, Justice Harlan abandoned his earlier conclusion in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (plurality opinion), that the First Amendment does not in any way limit punitive damages. With the cautionary remark that "matters are in flux," 403 U.S. at 72 n.3, Justice Harlan wrote that he now thought the Constitution imposed "at a minimum" two limits on punitive damage awards: there must be proof that "the speaker acted out of express malice," and punitive awards must "bear a reasonable and purposeful relationship to the actual harm done." *Id.* at 73, 77 (dissenting opinion; majority did not address question of punitive damages) (emphasis added). Justice Marshall and Justice Stewart concluded in *Rosenbloom* that any award of punitive or presumed damages in a defamation case is unconstitutional, because "the fear of the extensive awards that may be given . . . must necessarily produce the impingement on freedom of the press rec-

ognized in *New York Times*." *Id.* at 83 (dissenting opinion).

Justices Marshall and Stewart later joined the Court's opinion in *Gertz*. Indeed, the votes of these two Justices, who had previously rejected punitive and presumed damages altogether, were essential to the majority in *Gertz*. The opinion they joined does not contradict their earlier views. The Court's statements in *Gertz* are no more than tentatively worded dicta which "leave open the possibility that punitive damages may in time be found too intimidating to free expression to be allowed at all." Lewis, *New York Times v. Sullivan Reconsidered: Time To Return to "The Central Meaning Of The First Amendment"*, 83 Colum. L. Rev. 603, 617 (1983).

Justice Harlan, noting that the law with respect to punitive damages is "in flux," emphasized twice in *Rosenbloom* the importance of "further judicial experience in this area" before any authoritative rule could be stated. 403 U.S. at 74, 77. By now the lessons of experience are clear: in the past few years, the fear that punitive damage awards could be used to censor the press has become a reality. When *Gertz* was decided in 1974, massive damage awards against the press were virtually unheard of. Today, they have become commonplace.

- In April 1979 a jury returned a verdict of \$4.5 million, including \$1.5 million in punitive damages, against the *San Francisco Examiner* and its reporters. The plaintiffs, two policemen and a prosecutor, had complained of a series of articles describing their role in securing the conviction of a youth on a murder charge. *McCoy v. The Hearst Corp.*, Civ. No. 49915 (Cal. Ct. App., 1st App. Dist., Div. 4). An appeal is pending.

- In May 1980 a jury awarded a county sheriff \$200,000 in compensatory damages and \$500,000 in punitive damages against a small local newspaper, the *Ann Arbor News*, based on articles which accused the sheriff of improprieties including death threats against one of his deputies, brutality against private citizens, and the misappropriation of public funds. The verdict was reversed on appeal on the ground that the evidence could not support a finding of actual malice. *Postill v. Booth Newspapers*, 325 N.W.2d 511 (Mich. App. 1982).

- In June 1980 *The Alton (Illinois) Telegraph*, a respected publication with a circulation of 38,000 and net worth of about \$3 million, was ordered to pay \$9.2 million, including \$2.5 million in punitive damages, to a local builder because two of its reporters had written a memorandum to a U.S. Justice Department investigator passing on a tip that the builder was receiving money from the Mafia in the form of bank loans. *Green v. Alton Telegraph Printing Co.*, 107 Ill. App. 755, 438 N.E.2d 203 (1982).

- In February 1981 a federal court jury in Wyoming awarded the astounding sum of \$26.5 million—\$1.5 million in compensatory damages and \$25 million in punitive damages—to a former beauty pageant winner who complained she was defamed by a fictional article in *Penthouse* magazine. This judgment was reduced by the trial court to \$14 million, and reversed by the Court of Appeals on the ground that *Penthouse*'s fictional article could not reasonably be understood as describing any actual facts about the plaintiff. *Pring v. Penthouse, International, Ltd.*, 695 F.2d 438 (10th Cir. 1982), cert. denied, — U.S. —, 103 S.Ct. 3112 (1983).

- In March 1981 a California jury awarded \$300,000 in compensatory damages and \$1.3 million in punitives to Carol Burnett, who complained that the *National Enquirer* falsely reported she had engaged in loud and boisterous behavior in a Washington, D.C. restaurant. *Burnett v. National Enquirer, Inc.*, 7 Media L. Rep. [BNA] 1321 (Cal. Super. 1981). The verdict was remitted by the trial court to \$800,000 and reduced on appeal to \$200,000. *Burnett v. National Enquirer, Inc.*, 144 Cal.App.3d 991, 193 Cal. Rptr. 205 (1983). A further appeal is pending.
- A Texas jury returned a verdict of \$1 million in compensatory damages and \$1 million in punitive damages against the publisher of the *Dallas Morning News* in a case brought by a benefactor of a state university who was involved in a controversy over the firing of several faculty members and the resignation of the president. The plaintiff had alleged that his comments on the controversy were falsely characterized as threats against university officials. The judgment was reversed by a court of appeals on the ground that the allegedly defamatory statements were either true or protected statements of opinion, and on the further ground that there was no evidence of actual malice. *A. H. Belo Corp. v. Rayzor*, 644 S.W.2d 71 (Tex. App. 1982).
- In July 1982 a *Washington Post* story that Mobil President William Tavoulareas had "set up" his son in a ship management firm resulted in a \$2 million jury verdict, including \$1.8 million in punitive damages, against the Post. Judgment notwithstanding the verdict was subsequently entered in the Post's favor on the ground that there was no evidence of actual malice.

*Tavoulareas v. The Washington Post Company*, 567 F. Supp. 651 (D.D.C. 1983). Plaintiff's appeal is pending.

- A verdict of zero compensatory damages and \$2.5 million punitive damages was entered against an author and publisher whose book mistakenly asserted that the plaintiff had been indicted three times for the unauthorized practice of optometry. The author had confused plaintiff with his brother. *Rogers v. Doubleday*, 644 S.W. 2d 833 (Tex. App. 1982). The case is on appeal before the Texas Supreme Court.
- In May 1983 a judge entered a verdict of \$2 million in compensatory damages and \$5 million in punitive damages in favor of an Atlantic City hotel owner who claimed that an article in *Philadelphia Magazine* falsely characterized him as a drug dealer. *Edghill v. Municipal Publications, Inc.*, No. 2371 (Pa. Ct. Common Pleas, May Term 1972). Defendant's motion to recuse the trial judge is pending on appeal.
- In June 1983 a jury awarded \$4.5 million, including \$3 million in punitive damages, to a former Philadelphia district attorney, Richard Sprague, for an article in the *Philadelphia Inquirer* raising questions about the propriety of Sprague's participation in a homicide case involving the son of his close friend, a former state police commissioner. *Sprague v. Walter*, No. 3644 (Pa. Ct. Common Pleas, April Term 1973). The *Inquirer*'s motion for a new trial is pending.
- In September 1983 a Texas jury awarded \$600,000 in compensatory damages and \$1 million in punitive damages against a television station which reported that a company in the business of armorplating civilian vehicles for

sale principally in Central America was under investigation by the Bureau of Alcohol, Tobacco, and Firearms for smuggling guns. *International Security Group, Inc. v. The Outlet Co.*, No. 79-CI-10293 (Dist. Ct., 224th Jud. Dist., Bexar Co.).

- Recently, a federal court jury in Colorado awarded \$3.8 million in presumed damages to a company whose sales and employees were understated in a financial report prepared by the petitioner in this case, Dun & Bradstreet. *Sunward Corp. v. Dun & Bradstreet, Inc.*, Civil Action No. 82-K-147 (D. Colo.).

To be sure, many of these awards are reduced or set aside entirely by the trial court or the court of appeals. But that does not mitigate their chilling effect. Indeed, the high rate with which these huge awards are set aside bears out the view that juries award punitive damages to punish unpopular views or publications, with indifference to the values of free speech and free press, and disregard for even the minimum requirements of the law.

One case dramatically illustrates that the prospect of securing a reversal or reduction in a punitive damage award is small comfort to a small newspaper faced with a huge jury verdict. The \$9.2 million judgment against *The Alton Telegraph* forced the newspaper into bankruptcy and compelled it to settle the case before the appeal it had prepared could be heard. That appeal may well have been meritorious: it raised the issues whether the complaint, filed seven years after the allegedly defamatory memorandum was sent, was barred by the statute of limitations; whether the memorandum was the legal cause of the plaintiff's alleged damages; and whether the memorandum, which had been sent to the Justice Depart-

ment, was protected by the qualified common law privilege to report allegations of wrongdoing to law enforcement officials. Although these arguments may well have prevailed on appeal, the *Telegraph* simply could not afford to pursue them, and chose instead to settle the case for \$1.4 million in order to save itself from extinction. "How Libel Suit Sapped the Crusading Spirit of a Small Newspaper," *The Wall Street Journal*, September 29, 1983, at 1.

Today, *The Alton Telegraph* still feels the chilling effect of its libel judgment. Its editor, publisher and partial owner, Steven A. Cousley, told a *Wall Street Journal* reporter:

We are like a tight end who hears footsteps everytime he runs to catch a pass. . . . Wouldn't you be gun-shy if you nearly lost your livelihood and your home?

*Id.* According to *The Wall Street Journal* story, the *Alton Telegraph*

appears to be shying away from important stories. When someone called recently with a tip about misconduct in a sheriff's office, Steven Cousley decided against investigating. 'Let someone else stick their neck out this time,' a reporter heard him tell an editor. (Asked about the remark, Mr. Cousley says, 'I probably said that.')

*Id.* at 22.

The huge damage awards that juries have returned in recent defamation cases have unquestionably discouraged the "uninhibited, robust, and wide-open" inquiry and debate that *New York Times Co. v. Sullivan* was intended to foster. 376 U.S. at 270. These awards can threaten the very existence of some publications, and they dampen the enthusiasm and vigor of all.

Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive.

*Id.* at 278.

Particularly in the light of experience in recent years, the question must be posed: what legitimate state interest can justify punitive and presumed damages awards that have the undeniable effect, and in the case of punitives the express purpose, of chilling freedom of speech and of the press? On this point the language of *Gertz* is unequivocal. The states have "no substantial interest in securing for [defamation] plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." 418 U.S. at 349 (emphasis added). The only "legitimate State interest" in authorizing juries to award damages for defamation is "the compensation of individuals." *Id.* at 341. *See also id.* at 348-49; *Rosenbloom*, 403 U.S. at 66 (Harlan, J. dissenting) ("the legitimate function of libel law must be understood as that of compensating individuals for actual, measurable harm"); *Curtis Publishing Co. v. Butts*, 388 U.S. at 153. And punitive damages are "wholly irrelevant" to that state interest. *Gertz*, 418 U.S. at 350.

Because of the impact on protected speech of any remedy for unprotected speech, state remedies "must reach no farther than is necessary to protect the legitimate interest involved." *Gertz*, 418 U.S. at 349; *see Keyishian v. Board of Regents*, 385 U.S. 589, 602-04 (1967). It is plain, indeed tautological, that permitting recovery of proven actual damages adequately protects the state's legitimate interest in compensation. Punitive and presumed damages are unneces-

sary to protect that interest and are therefore unconstitutional.

Even if the deterrence of unprotected speech were a "legitimate function of libel law," *Rosenbloom*, 403 U.S. at 66 (Harlan, J., dissenting)—and no opinion of this Court suggests that it is—unprotected defamatory speech is effectively and sufficiently deterred by "the very possibility of having to engage in litigation, an expensive and protracted process," *Rosenbloom*, 403 U.S. at 52, and by the threat of compensatory damage awards. Thus in *Sprouse v. Clay Communications, Inc.*, 211 S.E. 2d 674, 692 (W. Va.), cert. denied, 423 U.S. 882 (1975), the West Virginia Supreme Court of Appeals rejected punitive damages on the ground that actual damages were "adequate for the purpose of dissuading publishers from similar willful and reckless conduct in the future." *See also Maheu v. Hughes Tool Co.*, 384 F.Supp. 166, 170-71 (C.D.Cal. 1974), *rev'd in part and aff'd in part*, 569 F.2d 459 (9th Cir. 1978). Assuming, *arguendo*, that there could be a legitimate state interest in providing an additional measure of punishment or deterrence in some cases, the present system of punitive damage awards is intolerable because punitive damages, "limited only by the gentle rule that they not be excessive," *Gertz*, 418 U.S. at 350, are not narrowly tailored to promoting that interest. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. at 602-04. Punitive damages are unpredictable in amount and often disproportionate to any harm actually done or reasonably foreseen. The largely uncontrolled discretion of juries to award punitive damages itself renders them unsuitable instruments to control unprotected speech, because the terror they inspire chills protected speech as well.

In the final analysis, damage awards whose very purpose is to punish speech have no place in a system that values and protects freedom of speech—and punitive and presumed damage awards which threaten the vigor and, in some cases, the very existence of the press, cannot be reconciled with a system that values and protects freedom of the press. Punitive and presumed damages, in short, cannot be squared with the First Amendment.<sup>2</sup>

**III. THE JUDGMENT IN THIS CASE SHOULD BE REVERSED ON THE GROUND THAT DUN & BRADSTREET IS ENTITLED TO THE MINIMUM PROTECTION IT HAS ASKED FOR**

There are, *amicus* submits, a number of open questions concerning the availability of punitive and pre-

<sup>2</sup> Three states have held that the First and Fourteenth Amendments bar punitive damages for libel plaintiffs who recover adequate compensatory damages. *Sprouse v. Clay Communications, Inc.*, 211 S.E.2d at 692; *McHale v. Lake Charles American Press*, 390 So.2d 556 (La. App. 1980), cert. denied, 452 U.S. 941 (1981); *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 859-60, 330 N.E.2d 161, 169 (1975). The Supreme Judicial Court of Massachusetts rested its holding on both state and federal constitutional grounds:

We reject the allowance of punitive damages in this Commonwealth in any defamation action, on any state of proof, whether based on negligence, or reckless or wilful conduct. We so hold in recognition that the possibility of excessive and unbridled jury verdicts, grounded on punitive assessments, may impermissibly chill the exercise of First Amendment rights by promoting apprehensive self-censorship.

367 Mass. at 859-60, 330 N.E.2d at 169.

At least two states have held that punitive damages in libel cases are barred by the free speech and free press guarantees of their own constitutions. *Hall v. May Department Stores*, 292 Or. 131, 637 P.2d 126 (1981); *Tasket v. KING Broadcasting Co.*, 86 Wash. 2d 439, 546 P.2d 81 (1976).

sumed damages in libel cases, but they need not and should not all be resolved in this case. As the foregoing discussion demonstrates, there is a serious question whether punitive and presumed damages should ever be allowed in a defamation case. If they were to be approved under any circumstances, there would certainly arise the troubling question whether they should ever be permitted against speech that touches upon public affairs or matters of public interest.<sup>3</sup>

<sup>3</sup> This Court has often said that speech concerning public affairs and public issues is at the core of the First Amendment's protection. See, e.g., *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs"); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."); *New York Times Co. v. Sullivan*, 376 U.S. at 270 ("debate on public issues should be uninhibited, robust, and wide-open"). And the Court has emphasized that "[f]reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). In *Rosenbloom v. Metromedia*, a plurality of this Court concluded that publications on matters of public interest and concern should receive the benefit of the *New York Times* standard for recovery of compensatory damages. The Court rejected that view in *Gertz*, because it abridged to an unacceptable degree the state's interest in providing "a legal remedy for defamatory falsehood injurious to the reputation of a private individual." 418 U.S. at 346. But that interest in compensating individuals who are defamed cannot justify an award of punitive damages. Nor can any state interest justify a damage award intended to punish speech on a matter of public interest and concern.

In *Gertz* the Court expressed concern about calling upon judges to determine "which publications address issues of

There may be a question, as the Petition for Certiorari puts it, whether there is a basis for distinguishing between the press and the rest of the public when it comes to punitive damages.<sup>4</sup> There may also be a question whether, if punitive damages were to be allowed, proof in addition to knowledge of falsity or

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'general or public interest' and which do not." 418 U.S. at 346. The line may be difficult (and in some contexts dangerous) to draw, and that difficulty may be an additional reason to prohibit punitive damages altogether.

<sup>4</sup> As this Court recently emphasized, the explicit guarantee of freedom of the press was important to the Framers. *Minneapolis Star v. Minnesota Commissioner of Revenue*, — U.S. —, 103 S. Ct. 1365, 1371 (1983). In that case and many others, the Court has emphasized the special role that the press plays in informing the public and guaranteeing that government is responsive to the public's will. See, e.g., *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 840 (1978); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975); *Mills v. Alabama*, 384 U.S. at 219; *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). That is not to say that members of the public, who enjoy the protection of the free speech provision of the First Amendment, should not enjoy full protection against punitive and presumed damage awards for defamation. Certainly there could be no basis for distinguishing between the established press and the lonely pamphleteer in defining the media for purposes of defamation law. Moreover, any line between media and nonmedia defendants in defamation cases would be a troubling and potentially mischievous one, which could effectively limit the diversity of viewpoints and information available to the public. Dun & Bradstreet apparently does not argue for media status, but as its own information business illustrates, information that is of insufficient general interest to warrant publication in the mass media may still be of vital importance to a small segment of the public.

reckless disregard for the truth should be required—namely, ill will, spite or hatred.<sup>5</sup>

The Court need not resolve these issues in this case. Dun & Bradstreet, a company that published certain financial and credit information about another company, seeks the protection of the actual malice standard to the extent that punitive and presumed damages are at issue. Surely it is entitled to no less protection than that, and the Court should so hold. Punitive

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<sup>5</sup> In *Smith v. Wade*, the Court expressly declined to intimate any view on the First Amendment issues raised by decisions permitting punitive damage awards in favor of a public official or public figure upon the showing of actual malice required for the recovery of compensatory damages. 103 S. Ct. at 1639 n.19. In his *Rosenbloom* dissent, Justice Harlan expressed the view that punitive damages should not be permitted unless "the plaintiff has proved that the speaker acted out of *express malice*." 403 U.S. at 77 (emphasis added). Such proof—that the speaker was motivated by ill will or personal animus—is quite different from proof of "actual malice" under *New York Times*. See, e.g., *Letter Carriers v. Austin*, 418 U.S. 264, 281-82 (1974); *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82 (1967); *Rosenblatt v. Baer*, 383 U.S. 75, 84 (1966); *Henry v. Collins*, 380 U.S. 356 (1965). Requiring such proof of bad motive would comport with "the common-law standard of 'malice' generally required under state tort law to support an award of punitive damages." *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 252 (1974), and might provide some additional protection against unwarranted punitive damage awards. Two states have held that punitive damages are barred by their constitutions unless there is proof that the publisher acted with actual hatred or ill will. *AAFCO Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 321 N.E.2d 580 (1974), cert. denied, 424 U.S. 913 (1976); *Walker v. Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450, cert. denied, 423 U.S. 1025 (1975).

damages for defamatory falsehoods should never be permitted upon facts of the sort deemed sufficient by the Vermont Supreme Court in this case—that Dun & Bradstreet's employee “inadvertently” mistook the bankruptcy of a former Greenmoss employee for the bankruptcy of Greenmoss itself, and that Dun & Bradstreet failed to adhere to its routine practice of prepublication verification. J. App. 35. That may be evidence of negligence, but not evidence that warrants the imposition of punitive damages under any standard compatible with the First Amendment. The Court should hold that Dun & Bradstreet is *at least* entitled to the minimum protection against punitive and presumed damages it has asked for—namely, the actual malice standard of *New York Times*—and it should leave the remaining questions concerning punitive and presumed damages to a case in which they are squarely presented and fully briefed.

#### IV. CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Vermont should be reversed.

Respectfully submitted,

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IN THE  
**Supreme Court Of The United States**  
OCTOBER TERM, 1983

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DUN & BRADSTREET, INC.,

v.

*Petitioner,*

GREENMOSS BUILDERS, INC.,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE SUPREME  
COURT OF THE STATE OF VERMONT

---

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE  
AND BRIEF AMICUS CURIAE IN SUPPORT OF  
RESPONDENT GREENMOSS BUILDERS, INC.**

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No. 83-18

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IN THE

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OCTOBER TERM, 1983

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DUN & BRADSTREET, INC.,

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*Respondent.*

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**ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF VERMONT**

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**MOTION FOR LEAVE TO FILE BRIEF  
AMICUS CURIAE IN SUPPORT OF RESPONDENT  
GREENMOSS BUILDERS, INC.**

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Sunward Corporation respectfully moves for leave to file the accompanying Brief Amicus Curiae. The consent of Respondent Greenmoss Builders, Inc., has been obtained. The consent of Petitioner Dun & Bradstreet, Inc. was requested but refused.

The interest of Sunward Corporation in this case arises from its position as a party to a case presently pending in the United States Court of Appeals for the Tenth Circuit involving the issue of whether the limitations on awards of presumed damages for libel set forth in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), apply to nonmedia defendants. *Sunward Corp. v. Dun & Bradstreet, Inc., appeal docketed*, No. 83-2644 (10th Cir. Dec. 23, 1983).

In the instant case, the Vermont Supreme Court held that Dun & Bradstreet was not entitled to a common law qualified privilege (although the trial court had instructed the jury regarding the privilege), and that *Gertz* does not

prohibit presumed and punitive damages when a private plaintiff sues a nonmedia defendant. While the *Sunward* case to which *Amicus Curiae* is a party presents the same issue regarding *Gertz*, the case differs in two critical respects from the case before the Court: (1) the trial court in *Sunward* followed the majority rule and extended a common law qualified privilege to the credit reports of Dun & Bradstreet, and (2) only presumed, and not punitive, damages were awarded. Because the Vermont Supreme Court refused to extend a common law privilege to Dun & Bradstreet, and the bulk of the damages awarded were punitives, the parties in the case before the Court may not fully address either the state interest in allowing presumed damages, or the common law privilege accorded credit reporting agencies. The following brief focuses on these two aspects of the law of libel, which could affect the Court's disposition of the issue presented for review.

Respectfully submitted,

/s/ William E. Murane

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1983

DUN & BRADSTREET, INC.,  
v. *Petitioner,*  
GREENMOSS BUILDERS, INC.,  
*Respondent.*

ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF VERMONT

**BRIEF AMICUS CURIAE IN SUPPORT OF  
RESPONDENT  
GREENMOSS BUILDERS, INC.**

**SUMMARY OF ARGUMENT**

Presumed damages in business libel situations serve the legitimate state interest of compensating defamed plaintiffs. The majority of states, however, protect Dun & Bradstreet from liability, and accordingly from presumed damages, by extending a qualified privilege to credit reports. Thus, a plaintiff cannot recover presumed damages except in instances when Dun & Bradstreet has acted recklessly or maliciously. Although this culpability requirement differs from the reckless disregard standard defined in the Court's decisions in *New York Times*, *St. Amant*, and *Gertz*, it adequately protects Dun & Bradstreet from self-censorship because of the characteristics of the type of commercial speech in which Dun & Bradstreet engages.

## ARGUMENT

### I. Background — The Media/Nonmedia Distinction Is Not Dispositive of This Case.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974), the Court recognized that the states have a legitimate interest in compensating plaintiffs for harm caused by defamatory speech. This interest, however, must be balanced against the concerns embodied in the First Amendment. After examining these concerns, the Court held in *Gertz* that the states could not allow presumed or punitive damages, at least in the absence of knowledge of falsity or reckless disregard for the truth by the defendant. *Id.* at 349. It was unclear whether the latter holding was a uniform pronouncement applicable to both media and nonmedia defamation cases.<sup>1</sup> The Court has since suggested on at least two occasions that the applicability of *Gertz* to nonmedia cases is an open question. *Hutchinson v. Proxmire*, 443 U.S. 111, 133 n.16 (1979); *Babbit v. United Farm Workers National Union*, 442 U.S. 289, 309 n.16 (1979). See also *Miskovsky v. Oklahoma Publishing Co.*, 51 U.S.L.W. 3284 (U.S. Oct. 12, 1982) (Rehnquist, J., dissenting from denial of cert.) (*Gertz* did not “wipe out” the common law of libel!).

State and lower federal courts are in conflict on the application of *Gertz*. Some have limited *Gertz* to cases involving media defendants, see, e.g., *Denny v. Metz*, 106 Wis.2d 636, 318 N.W.2d 141, cert. denied, 103 S. Ct. 179 (1982); *Rowe v. Metz*, 195 Colo. 424, 579 P.2d 83 (1978); others have extended its protection to all defendants, see, e.g., *Beneficial Management Corp. v. Evans*, 421 So.2d 92 (Ala. 1982); *DeCarvalho v.*

1. *Gertz* involved a “media” defendant and the opinion repeatedly used media references. See, e.g., 418 U.S. at 340 (“publisher or broadcaster”), 341 (“news media”), 342 (“press”), 345 (“communications media”). The Court’s opinion used such terms as “publisher or broadcaster” and “news media” over 15 times. See Note, *Mediaocracy and Mis-trust: Extending New York Times Defamation Protection to Nonmedia Defendants*, 95 Harv.L.Rev. 1876, 1877 n.9 (1982).

*daSilva*, 414 A.2d 806 (R.I. 1980). As Dun & Bradstreet stresses in its Brief, commentators have both decried this further complication to the “chaotic” law of defamation and criticized what they view as a baseless distinction between the “press” and the “rest of us.” See, e.g., Christie, *Injury to Reputation and the Constitution: Confusion and Conflicting Approaches*, 75 Mich.L.Rev. 43, 58 (1976). They have argued that consistency and fairness required uniform application of *Gertz*. But see Stewart, *Or Of The Press*, 26 Hastings L.J. 631 (1975) (asserting that *New York Times* and its progeny are based on the press clause). See also Anderson, *The Origins of the Press Clause*, 30 U.C.L.A. L. Rev. 455 (1983) (challenging historical view that speech and press clauses are equivalent or redundant).

Dun & Bradstreet is a peculiar standard bearer to be advancing the cause of the commentators. First, the alleged chaos in state defamation law does not apply to Dun & Bradstreet. In fact, the law of defamation is rather consistent regarding credit reporting agencies.<sup>2</sup> Congress has largely preempted the common law concerning consumer reporting agencies, 15 U.S.C. §§ 1681 to 1681t (1976),<sup>3</sup> and the majority rule recognizes a common law qualified privilege for commercial reporters such as Dun & Bradstreet.

On the surface, the argument that the First Amendment should not play favorites presents a more difficult issue. In its

2. Even if defamation law for credit reporting agencies were inconsistent, this alone would not mandate an across-the-board application of the First Amendment. The possibility of different legal standards among the states is inherent in our federal system. *Gertz* recognized this basic tenet of federalism. 418 U.S. at 345-46.

3. Acceptance of Dun & Bradstreet’s argument would raise questions about the constitutionality of sections of the Fair Credit Reporting Act (“FCRA”). If no distinctions can be drawn between the media and credit agencies, the requirements imposed by the FCRA would appear to be unconstitutional restraints on free speech. Even limiting the question to presumed and punitive damages causes concern. The FCRA allows punitive damages for “willfull” noncompliance with its requirements. 15 U.S.C. § 1681n. A credit agency might thus be liable for punitive damages based

Brief, Dun & Bradstreet exploits the many problems that might arise from a media/nonmedia distinction. The hard questions Dun & Bradstreet poses, however, are inapposite here. Regardless of how one distinguishes between the media and nonmedia, it is clear that Dun & Bradstreet belongs in the latter category. Indeed, Dun & Bradstreet has never claimed otherwise. More importantly, Dun & Bradstreet's broad-based argument has little to do with its credit reports. These reports are not part of the "robust debate of public issues," which inspired *New York Times v. Sullivan* and its progeny.<sup>4</sup>

To resolve this case, the Court need not decide whether the Constitution should distinguish between the media and nonmedia. Instead, the critical inquiry is whether, in light of the state interest in compensating defamed plaintiffs, presumed damages impermissibly cause self-censorship of a specific type of commercial speech. The answer to that question requires an examination of the following factors: (1) the state

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upon a culpability finding that differs from the Court's "actual malice" standard. See generally *Collins v. Retail Credit Co.*, 410 F. Supp. 924 (E.D. Mich. 1976). In *Collins*, the court found willful noncompliance with the Act, as well as a common law libel. However, the court's findings are based on the credit agency's conduct; no mention is made of knowledge of falsity or subjective doubts about the truth of the report. See also *Rasor v. Retail Credit Co.*, 87 Wash.2d 516, 554 P. 2d 1041, 1049 (1976) (regarding preemption of common law, "the intent of Congress in framing the Fair Credit Reporting Act was simply to limit recovery for presumed injury to instances of "malice and willful intent" . . . ). Common law "malice" or "willful intent" may differ substantially from the *New York Times/St. Amant* protection requested by Dun & Bradstreet. See Part III *infra*.

4. Dun & Bradstreet defends this aspect of its reports, which was emphasized by the Vermont Supreme Court, by arguing that content-based distinctions have been condemned by the Court. This not only ignores the Court's commercial speech cases, discussed in Part IV *infra*, it also overlooks the concerns that underlay *Gertz*' rejection of *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). A credit report is a credit report. In evaluating these reports, courts would not be called upon to make ad hoc determinations of what is of "public interest" or "relevant to self-government." See *Gertz*, 418 U.S. at 346.

interest in allowing presumed damages, (2) the level of protection provided by the common law, and (3) the specific nature of the speech engaged in by Dun & Bradstreet. Analysis of these factors reveals that the concerns announced in *Gertz* regarding presumed damages are inapplicable to libelous Dun & Bradstreet credit reports. The common law provides adequate protection for these reports and therefore this Court should not intrude on state law via the Constitution.<sup>5</sup>

## II. The States Have A Legitimate Interest in Preserving The Doctrine of Presumed Damages.

*Gertz* recognized that the states have a legitimate interest in providing compensation to defamed plaintiffs. 418 U.S. at 348. The doctrine of presumed damages is a method for achieving this interest. The Colorado Supreme Court has cogently stated the basis for the doctrine:

The rationale for this rule derived from the difficulty of proving damages in [slander per se situations]. This is particularly true where, as here, the defamatory remarks are related to the conduct of an individual's business affairs. It is the rare case in which a slander will destroy business profits in such a way that the loss can be directly traced to the slanderous remarks.

*Rowe v. Metz*, 195 Colo. 424, 579 P.2d 83, 84 (1978).

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5. A noted commentator discusses First Amendment methodology in terms of a distinction between the scope of protection provided by the First Amendment, contrasted with the level of protection provided. Shrifin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 U.C.L.A. L. Rev. 915 (1978). A ruling that *Gertz* applies only to the media would arguably be a ruling based on the scope of the First Amendment. The position of Amicus Curiae is a "level of protection" argument. In essence, its position is that, even if the Constitution protects Dun & Bradstreet reports, the protection provided by the common law equals or exceeds that required by the Constitution.

Nowhere is this rationale more applicable than in situations involving Dun & Bradstreet reports. It may be extremely difficult for a plaintiff to link directly the Dun & Bradstreet report either to a decline in sales or to a loss of potential business.

The harm resulting from an injury to reputation is difficult to demonstrate both because it may involve subtle differences in the conduct of the recipients toward the plaintiff and because the recipients, the only witnesses able to establish the necessary causal connection, may be reluctant to testify that the publication affected their relationship with the plaintiff.

Note, *Developments in the Law — Defamation*, 69 Harv.L.Rev. 875, 891-92 (1956) (hereinafter cited as *Developments*). Not only are business people naturally reticent in revealing the basis for a decision, but Dun & Bradstreet contributes to this silence by insisting in its subscriber contracts that it not be revealed as a source of information.<sup>6</sup> (A standard Dun & Bradstreet subscriber contract is appended as Appendix A.) A subscriber who revealed that Dun & Bradstreet was the source of information would be in breach of this contract of silence.<sup>7</sup>

6. It is ironic that Dun & Bradstreet relies so heavily on First Amendment values, while at the same time placing such strict limitations on the "free flow" of information contained in its reports.

7. The typical Dun & Bradstreet contract contains restrictions such as the following:

All information furnished hereunder shall be held in strict confidence and shall never be reproduced, revealed or made accessible in whole or in part, in any manner whatsoever to any others unless required by law.

Neither Dun & Bradstreet, Inc. nor the Reference Books and/or Directories will be identified by the subscriber as a source reference . . . .

See Appendix §§ 2 & 5, at A-2.

A plaintiff would be hard pressed to establish with any certainty that a false Dun & Bradstreet report was decisive in causing a lost sale, especially if the effect of the Dun & Bradstreet report was indirect (i.e., it caused a pernicious rumor, which in turn affected the final business decision). In fact, in the face of Dun & Bradstreet's contracts of silence, a potential plaintiff might never learn that Dun & Bradstreet had spoken ill of it, much less determine that Dun & Bradstreet was the source of a damaging rumor.<sup>8</sup> The plaintiff also would face tremendous problems in trying to locate or identify lost potential business. One would not know which customers failed to make initial contact because of either a Dun & Bradstreet report, or a rumor whose source was the report.

The doctrine of presumed damages, much like *res ipsa loquitur* in a similar context, helps a plaintiff overcome these formidable difficulties. Indeed, an analogy to *res ipsa loquitur* is particularly appropriate in circumstances involving Dun & Bradstreet reports. Even if a plaintiff cannot directly establish lost sales because of a defamatory report, it is counter-intuitive to assert that such a report by this ubiquitous and highly respected organization is not harmful. Without the presumption of damages, however, a plaintiff which has suffered substantial harm may not reach the jury because of a lack of causal proof. Under these circumstances, the appropriateness of the presumption is clear. See *Developments* at 892 ("The application of such presumptions should depend upon the potentiality of harm to the particular plaintiff from the publication in question . . . .").

In *Gertz* the Court recognized that presumed damages, unlike punitive, are relevant to the state interest of compensating defamed parties. 418 U.S. at 350. Somewhat contradictorily, however, the Court called the presumption "an oddity of tort law" because it "allows recovery of purportedly compensatory damages without evidence of actual loss." *Id.* at 349. While perhaps true in situations involving harm of a

8. This factor alone distinguishes Dun & Bradstreet from the news media.

less tangible nature, this reasoning does not apply to the typical business libel where the injury is real, but proof of causation may be difficult. Additionally, it would be ironic to deny the presumption in light of the Court's statement that "actual damages" may include intangible harm such as mental suffering. 418 U. S. at 350. Causal proof of these type of damages is arguably easier to present than is proof of lost business. *See Time, Inc. v. Firestone*, 424 U. S. 448 (1976). Moreover, the value a jury might attach to these intangible damages is largely unbounded.

The doctrine of presumed damages in a business libel context does not leave a jury with unbridled discretion to award any amount of damages it desires. Damages cannot be based on pure speculation. They must bear some relationship to the injuries sustained. *See, e.g., Maheu v. Hughes Tool Co.*, 569 F.2d 459, 474-77 (9th Cir. 1977). Thus, particularly in the context of a business libel, a plaintiff will present evidence either of a decline in profits, or of a failure to achieve expected growth following the defamatory statement.<sup>9</sup> The defendant may challenge these figures or present proof attributing the losses to other factors. The jury must resolve the evidentiary disputes and arrive at a damage calculation. The trial judge is available to ensure that this calculation is supported by the evidence. Therefore, in the business libel context, rather than being merely an "oddity of tort law," presumed damages serve an important function in allowing states to compensate defamed parties.

### III. The Level of Common Law Protection Afforded Dun & Bradstreet is Adequate and Appropriate.

While Dun & Bradstreet bemoans the disparate treatment it receives under the First Amendment as compared to the media, in reality Dun & Bradstreet was a favorite child of the common law long before this Court introduced the Constitution to the law of defamation. In recognition of the important role credit reports play in the commercial world, the majority of states extend a common law qualified privilege to Dun & Bradstreet reports. *Sunward Corp. v. Dun & Bradstreet, Inc.*, 568 F. Supp. 602, 607 (D. Colo. 1983) (citing cases). The reason for this privilege is that

[t]hose about to engage in a commercial transaction like to know something about the persons with whom they are dealing. Often they are unable to get that information themselves and must obtain it through mercantile agencies. In furnishing such information, the agencies are supplying a legitimate business need and ought to have the protection of the privilege. Without such protection, few would undertake to furnish the information, and the cost would be high, if not prohibitive.

L. ELDREDGE, *THE LAW OF DEFAMATION* § 86, at 468-69 (1978) (quoting *In re Retailers Commercial Agency Inc.*, 342 Mass. 515, 174 N. E.2d 376, 379 (1961)).<sup>10</sup>

The standard of conduct necessary to overcome the privilege varies slightly from state to state.

Most require a showing of something more than mere negligence to defeat the privilege. To prevail, a

9. When "special" damage need not be shown, "general" damage may be recovered. That such damage has been suffered need not be proved by the Plaintiff, for it is presumed, but it is customary to make proof of some of the items. The elements of "general" damage [include] . . . loss of business . . . .

C. McCORMICK, *HANDBOOK OF THE LAW OF DAMAGES* § 116 (1935).

10 Several courts, including the Vermont Supreme Court in the present case, have questioned the wisdom of the reasoning underlying the privilege. *See, e.g., Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25 (5th Cir. 1973). This Brief will not pursue this dispute. Note, however, that Professor Eldredge feels that cases such as *Hood* "should lead some other courts to reconsider their present rule in this situation." L. ELDREDGE, *supra* p. 9, § 86, at 469 n. 70.

plaintiff generally must show the credit agency was reckless in conducting its investigation. Bad faith, intent to injure, or ill-will also defeat the privilege.

R. SACK, *LIBEL, SLANDER, AND RELATED PROBLEMS* 308 (1980) (footnotes omitted). See Annot., *Sufficiency of Showing of Malice or Lack of Reasonable Care to Support Credit Agency's Liability for Circulating Inaccurate Credit Report*, 40 A.L.R. 3d 1049 (1971). Although a court might refer to the standard as "reckless disregard for the truth," recklessness is often defined in the common law sense of "wanton and reckless disregard of the circumstances," rather than as defined by the Court in *St. Amant v. Thompson*, 309 U.S. 727 (1968) ("reckless disregard" defined as subjective doubt about the truth). See, e.g., *Roemer v. Retail Credit Co.*, 3 Cal. App.3d 368, 83 Cal. Rptr. 540, 542 (1970). See also *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 250 n.3 (1974) (in a "false-light" case, trial court required reckless disregard for truth, but defined "recklessly" as "wantonly, with indifference to consequences"); *Williams v. Burns*, 463 F. Supp. 1278, 1283 (D. Colo. 1979) (discussing showing necessary to overcome a qualified privilege under Colorado law). Similarly, a showing of "malice" might overcome the privilege. This is not necessarily "malice" in the sense of ill-will, or "actual malice" as defined by this Court. Neither is it malice implied solely from the defamatory statement itself. Rather "[m]alice . . . can consist of an unreasonable and wrongful act done intentionally, without just cause. . . . Malice may be inferred in the situation where the defendant has no reasonable basis for believing that the statement is true. This would be the case where there had been a failure to make an adequate investigation." *Brown v. Skaggs-Albertson's Properties, Inc.*, 563 F.2d 983, 986-87 (10th Cir. 1977) (applying Oklahoma law and citing *Oberman v. Dun & Bradstreet, Inc.*, 460 F.2d 1381 (7th Cir. 1972)). Regardless of the exact definition of "reckless" or "malice", a high degree of culpability on the part of Dun & Bradstreet is a predicate to liability. Therefore, in the majority of states Dun & Bradstreet is subject neither to liability

without fault nor liability based on simple negligence.<sup>11</sup> Since presumed damages are irrelevant absent basic liability, Dun & Bradstreet need not worry about these damages except when its conduct is highly culpable.<sup>12</sup>

The type of conduct that causes Dun & Bradstreet to lose its privilege — recklessness or maliciousness — is seated in well-developed concepts of tort law,<sup>13</sup> which are arguably easier for the average juror to grasp than is the concept of "actual malice." See Hunter, *A Reprise on Herbert v. Lando and the Law of Defamation*, 71 Ky.L.J. 569, 574-77 (1982-1983). The facts of this case demonstrate that these tort concepts are better suited for evaluating Dun & Bradstreet's conduct than is the subjective inquiry mandated by *St. Amant* and *Herbert v. Lando*, 441 U.S. 153 (1979). Here, Dun & Bradstreet issued a report based on information from an untrained high school student without any verification of the information. Yet Dun & Bradstreet blithely asserts in its brief that no "reckless disregard for the truth" existed because no one questioned the good faith of Dun & Bradstreet's teenage reporter. In the *Sunward* case, the Dun & Bradstreet reporter described the information in the reports as "guesstimates." These guesstimates portrayed Sunward as a company with annual sales,

11. In *Gertz* the Court emphasized the potential chilling effect of liability without fault. 418 U.S. at 346. Because of the common law privilege, this concern is inapplicable to Dun & Bradstreet credit reports.

12. The applicability of presumed damages will also depend on whether the statement is libelous per se, or, in most states, on whether the statement would have been slanderous per se if spoken. In other words, Dun & Bradstreet is subject to presumed damages when a report is libelous on its face, or, in those states that have incorporated the four "slander per se" categories into their law of libel, when a report would tend to injure a plaintiff in his trade or business. See generally R. SACK, *LIBEL, SLANDER, AND RELATED PROBLEMS* 96-98 (1980).

13. This is not to suggest that these concepts are free from doubt in the abstract. See *Smith v. Wade*, 51 U.S.L.W. 4407 (U.S. Apr. 20, 1983). They are, however, given meaning by their development in the tort law of each state. See, e.g., *Walker v. Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450, 457, cert. denied, 423 U.S. 1025 (1975) ("term 'reckless disregard' has had rather frequent usage in the tort field in this state").

according to Dun & Bradstreet, of less than \$1 million, when in fact sales approached \$30 million. Dun & Bradstreet fails to suggest why the Constitution should protect its recklessly indifferent behavior. In fact, the Court's commercial speech cases suggest that the Constitution does not prohibit the states from reaching conduct likely to produce such inaccurate information.

#### IV. Credit Report "Speech" Requires Less Protection Than Does Other Speech.

Under the common law of most states, Dun & Bradstreet must be reckless or malicious before it feels the potential chill brought on by presumed damages. This Brief now turns to the question of whether the Constitution mandates an even higher level of culpability before the states can allow presumed damages. This question will be addressed within the context of the kind of speech in which Dun & Bradstreet engages. When protection of commercial speech is balanced against the states' legitimate interest in allowing presumed damages, the conclusion must be that the common law provides Dun & Bradstreet with adequate protection and that constitutional intervention on the part of this Court is unwarranted.

Approximately two years after *Certz*, the Court extended constitutional protection to commercial speech. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). The Court distinguished then, and has continued to distinguish, commercial speech from other speech. See, e.g., *Central Hudson Gas and Electric Co. v. Public Service Commission*, 447 U.S. 557 (1980). Justice Powell's opinion in *Virginia State Board* noted that, because of its economic nature and ease of verification, commercial speech is less subject to self-censorship than other speech. 425 U.S. at 772 n.24. See also *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 462 n.20 (1978) (in rejecting application of overbreadth doctrine to commercial speech, the Court stated that "[c]ommercial speech is not as likely to be deterred as noncommercial speech . . ."). In

fact, Justice Powell noted that the protections set forth in *New York Times v. Sullivan*, 376 U.S. 254 (1964), might be unnecessary for commercial speech, and specifically compared *New York Times* with a case in which Dun & Bradstreet was a party, *Dun & Bradstreet, Inc. v. Grove*, 404 U.S. 898 (1971) (denying cert.). The Court has reaffirmed the distinctive nature of commercial speech in more recent cases. See, e.g., *Hudson Gas*, 447 U.S. at 564 n.6.

Justice Powell's general analysis of commercial speech fits perfectly in the specific context of Dun & Bradstreet reports. First, these reports are undeniably commercial speech. See *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829, 833 (8th Cir. 1976) (opinion by Justice Clark). They are about businesses, and are distributed to a limited audience that pays for the reports. They assist that audience in evaluating commercial transactions. See generally *Hudson Gas*, 447 U.S. at 561-62. Second, the information in a typical Dun & Bradstreet report is easy to verify. The reports concern sales figures, payment habits, financial status and the like. Each of these matters tends to be a black or white fact. Moreover, Dun & Bradstreet has an elaborate system for obtaining and verifying these facts.<sup>14</sup> Third, Dun & Bradstreet's financial status and the extent of its distribution system reveal the economic hardiness of its reports. Dun & Bradstreet is a multi-million dollar enterprise (its net income in 1982 was \$34,249,000), supplying information on "over 4.5

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14. In cases in which Dun & Bradstreet follow its own training, supervision, and verification procedures, a plaintiff would be hard pressed to establish the degree of culpability necessary for a finding of liability. Unfortunately, these procedures were not followed in the instant case. Similarly, Dun & Bradstreet failed to follow its own third-party verification requirements in the *Sunward* case. Note, however, that Dun & Bradstreet in *Sunward* did follow its procedure of issuing prompt notice to subscribers upon notification of an error in its reports. The trial judge relied heavily on this fact in refusing to submit the issue of punitive damages to the jury, and in submitting an instruction regarding mitigation of damages.

million" businesses to over 80,000 subscribers.<sup>15</sup> Any argument by Dun & Bradstreet that it needs constitutional protection or else its voice will be chilled flies in the face of this reality. In fact, even in states that refuse to extend a common law privilege to credit reporting agencies, Dun & Bradstreet appears to be thriving. *See Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25, 32 (5th Cir. 1973), cert. denied, 415 U.S. 985 (1974). Moreover, Dun & Bradstreet is in a superior position compared to defamed plaintiffs to absorb the societal harm its reports cause. Dun & Bradstreet can spread its costs among its many subscribers.

These basic distinctions suggest a more fundamental reason why the protections of *Gertz* and *New York Times* should not apply to credit reports. The usefulness of commercial speech is directly tied to its accuracy. *Hudson Gas*, 447 U.S. at 563. Unlike false information concerning public issues, *see New York Times*, 376 U.S. at 279 n.19, inaccurate commercial speech has no redeeming value whatever. Not only is accuracy important for the businesses on which Dun & Bradstreet reports, it is important to Dun & Bradstreet's subscribers. Given this need for accuracy on the part of all concerned parties, Dun & Bradstreet's argument that application of *Gertz* is necessary to avoid self-censorship is untenable. No societal goal is served in allowing Dun & Bradstreet to put forth defamatory material maliciously or after a grossly inadequate investigation.

Dun & Bradstreet will no doubt respond that the argument of Amicus Curiae is "content based." In its decisions developing the commercial speech doctrine, however, the Court has recognized "the 'commonsense' distinction" between commercial speech and other varieties of speech. *Hudson Gas*, 447 U.S. at 562. In fact, "[i]f commercial speech is to be distinguished, it 'must be distinguished by its content.'" *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 504 n.11 (1981) (quoting *Virginia State Board*, 425 U.S. at

15. This information is derived from documents supplied to Sunward Corporation by Dun & Bradstreet during discovery.

761).<sup>16</sup> While the problems inherent in content regulation might apply to other speakers in other contexts, they are not applicable to commercial speakers such as Dun & Bradstreet. Moreover, in examining commercial speech, the Court has stated that the two features of commercial speech noted above — economic hardness and ease of verification — permit regulation of its content. *Id.* at 564 n.6. In fact, in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 462-66 (1978), the Court rejected an argument that actual injury was necessary before a state could regulate an attorney's commercial speech. The Court noted that the state interest in prohibiting the dangers inherent in attorney solicitation justified a prophylactic rule, regardless of whether actual injury occurred. Similarly, the great likelihood that a defamatory credit report will cause harm, accompanied by the difficulty in linking that harm to the report, justifies a state in allowing presumed damages.

The type of speech in which Dun & Bradstreet engages is fundamentally different from the speech that spawned *New York Times* and its progeny. *Gertz* expressed a fear that juries might use presumed damages to punish unpopular speech. 418 U.S. at 349. This possibility is not likely to occur in a situation involving Dun & Bradstreet. The topics on which Dun & Bradstreet speaks are not controversial topics likely to draw a jury's ire. As demonstrated above, presumed damages are based on compensating the plaintiff, and the jury is so

16. Content, however, is not all that distinguishes commercial speech. The audience and purpose behind the speech are also critical. For example, Dun & Bradstreet asks why a distinction should be drawn between information it provides, and the same information published in a newspaper. Petitioner's Brief 29. The newspaper is providing newsworthy information to the general public. Dun & Bradstreet is providing its subscribers with information for the purpose of evaluating commercial transactions. The latter is the essence of commercial speech as discussed in *Hudson Gas*. It is less subject to self-censorship than is the newspaper report.

instructed.<sup>17</sup> If Dun & Bradstreet is recklessly indifferent in its investigation or acts maliciously, then forcing it to pay for this conduct should not be deemed unconstitutional.

The law of defamation, while undoubtedly complex, has gradually evolved in the states. Influenced by the reasoning of *New York Times* and its progeny, it continues to do so. The Court should resist the urge to interfere with this process, especially when premised on such broad-based arguments as those presented by Dun & Bradstreet. Although certain doctrines may be arcane or based on little more than historical accident, this is not the case with the law regarding defamatory credit reports. State and lower federal courts, as well as Congress, are addressing the issues with modern reasoning and responses. They should be allowed to continue to seek the best balance between the competing interests involved. Dun & Bradstreet's position, divorced as it is from the facts, should be rejected.

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17. Contrast this with punitive damages where the jury is instructed that the purpose of these damages is to punish the defendant and deter future misconduct. Even here, however, the focus is on the defendant's conduct rather than its speech.

## CONCLUSION

Based upon the foregoing, Amicus Curiae Sunward Corporation respectfully requests the Court to affirm the judgment of the Vermont Supreme Court.

Dated this 20th day of January, 1984.

Respectfully submitted,

/s/ William E. Murane

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# Dun & Bradstreet, Inc.

The undersigned subscriber hereby employs Dun & Bradstreet, Inc. to furnish information on businesses in the geographic area covered by the Reference Books leased hereunder for the term beginning \_\_\_\_\_, 19\_\_\_\_\_, and ending \_\_\_\_\_, 19\_\_\_\_\_, and agrees to pay in advance for:

## BASIC SERVICE

WINTER (January) 19\_\_\_\_\_  SPRING (March) 19\_\_\_\_\_  SUMMER (July) 19\_\_\_\_\_

FALL (September) 19\_\_\_\_\_  ADVANCE SUMMER (May) 19\_\_\_\_\_

## Response Units Above Basic Service

Response Units @ \$10.55 each ..... \$\_\_\_\_\_

Less Discount @ \$370.00 per 100 ..... \$\_\_\_\_\_

For additional Response Units requested, the subscriber agrees to pay on demand at the rate of \$10.55 each.

Dun & Bradstreet's written response (based on information in-file) to a subscriber's inquiry on a business located in the continental United States (excluding Alaska) furnished by mail is valued as one response unit. The additional response unit values of certain other services appear on the "Schedule of Additional Services" below. Of the total sum shown, \$10.00 is in payment of an Annual Subscription to the magazine "Dun & Bradstreet Reports." If not desired, \$10.00 may be deducted. Additional subscriptions \$10.00 each.

## DUNS DIAL SERVICE\*

**DUNS DIAL Response Units @ \$685.00 per 100**  
**Less Discount @ \$285.00 per 100**

For additional DUNS DIAL Response Units requested, subscriber agrees to pay on demand at the rate of \$6.85 each.

DUNS DIAL is an optional telephone service for subscribers desiring immediate information in addition to the written report provided (and charged for) under Basic Service. Values of available DUNS DIAL services are shown below under Schedule of DUNS DIAL SERVICES.

## DUNS FINANCIAL PROFILE REPORTS

**DUNS FINANCIAL PROFILE REPORTS-OPTION A**  
(minimum order of 50 reports, additional reports in blocks of 50)  
at the following rate:  
Option B or C: Special selection order form attached

<input type="checkbox"/> Sales Lead Service (Area _____)	\$_____			
<input type="checkbox"/> Reference Book of Transportation <input type="checkbox"/> SPRING... 19_____	<input type="checkbox"/> FALL... 19_____	\$_____		
<input type="checkbox"/> Reference Book of Manufacturers <input type="checkbox"/> SPRING... 19_____	<input type="checkbox"/> FALL... 19_____	\$_____		
<input type="checkbox"/> Apparel Trades Book <input type="checkbox"/> FEBRUARY	<input type="checkbox"/> MAY	<input type="checkbox"/> AUGUST	<input type="checkbox"/> NOVEMBER	\$_____
<input type="checkbox"/> Change Notification Service	<b>SPECIAL SELECTION</b>			\$_____
<input type="checkbox"/> Exception Credit Update Service				<b>BASIC ORDER FORM</b>
<input type="checkbox"/> (designate) _____	SUB-TOTAL FOR SALES DEVELOPMENT, INDUSTRY REFERENCE BOOK AND OTHER SERVICES...			\$_____
	<b>TOTAL</b>			\$_____

## SCHEDULE OF ADDITIONAL SERVICES

### Business Information Reports

On businesses located in Alaska .....	1	To access and search file .....
On businesses located in Hawaii .....	1/2	To provide key points read-out .....
On businesses located in Puerto Rico .....	1 1/2	To provide full report read-out .....
On businesses edited in Analytical format .....	0	To provide One-way Priority Service .....
With Continuous Service .....	1/2	To provide Two-way Priority service .....
On businesses not in-file .....	0	To provide P D Q investigation and response .....

The listed values are subject to change upon 30 days notice. Please contact your Dun & Bradstreet representative for information on other available services.

## IMPORTANT

Dun & Bradstreet, Inc. and the undersigned subscriber, by signing this Subscription Agreement, agree to and intend to be bound by the terms hereof including the Terms of Agreement on the reverse side, which are made a part of this subscription.

## Accepted

*Dun & Bradstreet, Inc.*  
76-24790415

By \_\_\_\_\_

Name of Subscriber .....

Authorized Signature .....

Mailing Address .....

City .....

Date .....

Title .....

State .....

Zip .....

SIC #

Line of Business

## TERMS OF AGREEMENT

1. All information on businesses furnished to the subscriber by Dun & Bradstreet, Inc. pursuant to this Agreement is for the exclusive use of the subscriber solely as one factor in the subscriber's credit, insurance, marketing or other business decisions relating to corporations, partnerships, sole proprietorships or other business, government or non-profit entities or such entities' stockholders, directors, officers, partners, proprietors or employees in their capacities as such. It is expressly prohibited to use such information as a factor in establishing an individual's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment.

2. All information furnished hereunder shall be held in strict confidence and shall never be reproduced, revealed or made accessible in whole or in part, in any manner whatsoever to any others unless required by law. Any question concerning such information should be referred to Dun & Bradstreet, Inc. for verification and/or review with the subject of same. It is expressly understood that the subscriber shall neither request information for the use of others, nor permit requests to be made under this subscription by others.

3. Because of the large number of informational sources upon which Dun & Bradstreet, Inc. must rely, and over which Dun & Bradstreet, Inc. has no control, the subscriber acknowledges that Dun & Bradstreet, Inc. does not and cannot guarantee or warrant correctness or completeness of information furnished. Such information is to be considered current within Dun & Bradstreet, Inc.'s established procedures for revision of same and usually is not the product of independent investigation prompted by each customer inquiry. It is further understood by the subscriber that every business decision, to some degree or another, represents the assumption of a risk, and that Dun & Bradstreet, Inc., in furnishing information, does not and cannot underwrite the subscriber's risk, in any manner whatsoever. Dun & Bradstreet, Inc., therefore, shall not be liable for any loss or injury caused in whole or in part, either by its negligent acts of omission or commission or those of its officers, agents or employees or by contingencies beyond its control, in procuring, compiling, collecting, interpreting, reporting, communicating or delivering information, including, but not limited to, information contained in responses to subscriber's inquiries, Reference Books, Apparel Trades Books, and/or Directories.

4. This Agreement covers service to the subscriber at only a single place of business, unless otherwise stated, and all of the Reference Books and/or Directories loaned at any time shall be kept and used only at the single place of business specified in this subscription, except that the subscriber after first obtaining written permission and complying with written instructions given by Dun & Bradstreet, Inc., may furnish the Reference Books and/or Directories to another to have all or part of the listings copied or duplicated in punched card or other form suitable for further handling or processing for the exclusive use of the subscriber. The Reference Books and/or Directories shall be returned to Dun & Bradstreet, Inc. forthwith without further notice upon receipt by the subscriber of any subsequent edition thereof or at the expiration or termination of this subscription.

5. Neither Dun & Bradstreet, Inc. nor the Reference Books and/or Directories will be identified by the subscriber as a source reference unless required by law or except upon obtaining written permission from Dun & Bradstreet, Inc., which, without in any way limiting the foregoing, reserves the right, in its absolute discretion, to verify the accuracy of any quotation or statement derived from information obtained from Dun & Bradstreet, Inc. under this subscription.

6. If the cost of serving the subscriber under this agreement is increased as a result of measures prescribed by government authority or by any other cause, then the terms of this agreement for its unexpired period may be revised by Dun & Bradstreet, Inc. to such extent as in its judgment may be necessary to cover the increased costs. In such event, however, the subscriber shall have the option of continuing the agreement on the revised basis, or of discontinuing the service and upon such discontinuance, Dun & Bradstreet, Inc., shall be obligated to refund the unearned portion of any consideration paid by the subscriber under this agreement.

7. This Agreement is not binding upon Dun & Bradstreet, Inc. until accepted by it. Dun & Bradstreet, Inc. hereby reserves the right to terminate this Agreement upon thirty (30) days written notice, with or without reason, in which event it shall be obligated to refund the unearned portion of any consideration paid by the subscriber under this Agreement.

8. If the terms of payment are otherwise than in full in advance, then if any payment provided for is not made when due the whole amount shall immediately become due and payable. Delivery charges and applicable taxes are not included in the Total on the face of this Agreement, and will be invoiced to the subscriber.

9. The rights and obligations of the parties to this Agreement apply from the date of signing to all information, including Reference Books and/or Directories, furnished at any time to the subscriber, whether relating to concerns located within or without the geographical area encompassed by such publications. This written Agreement contains the entire and only Agreement between the parties regarding the subject matter hereof and there are merged herein all prior and collateral representations, promises and conditions. Any representation, promise, guarantee or condition not incorporated herein shall not be binding upon either party. No waiver, or amendment of this Agreement shall be binding on the parties unless in writing, signed by an authorized official of Dun & Bradstreet, Inc. and the subscriber.

10. The above Terms of Agreement apply to the furnishing to the subscriber by Dun & Bradstreet, Inc. of any kind of information on businesses and any kind of business information service, whether or not specifically referred to in this Subscription Agreement and whether or not furnished at additional cost to the subscriber and whether or not currently being furnished by Dun & Bradstreet, Inc. to its subscribers.

Business \_\_\_\_\_

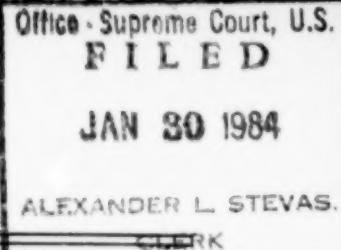
Telephone # \_\_\_\_\_

SIC # \_\_\_\_\_

Subscriber # \_\_\_\_\_

Signing this Agreement \_\_\_\_\_

Tax Exemption # \_\_\_\_\_



NO. 83-18

In The  
**Supreme Court of the United States**  
October Term, 1983

—0—  
DUN & BRADSTREET, INC.,

*Petitioner,*  
vs.

GREENMOSS BUILDERS, INC.,

*Respondent.*

—0—  
On Writ of Certiorari to the  
Supreme Court of the State of Vermont

—0—  
**BRIEF OF RESPONDENT**

—0—  
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**QUESTION PRESENTED FOR REVIEW**

Respondent, Greenmoss Builders, Inc., believes that the question presented for review is:

I. Whether a state regulatory system that vigorously protects the target of false and misleading commercial speech from false factual statements made about its financial condition is constitutionally appropriate under *Gertz v. Robert Welch, Inc.*

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In The  
**Supreme Court of the United States**

October Term, 1983

DUN &amp; BRADSTREET, INC.,

*Petitioner,*

vs.

GREENMOSS BUILDERS, INC.,

*Respondent.*On Writ of Certiorari to the  
Supreme Court of the State of Vermont**BRIEF OF RESPONDENT****STATEMENT OF THE CASE****1. The Facts**

Respondent, Greenmoss Builders, Inc., (hereinafter Greenmoss)<sup>1</sup> is a moderately sized building contractor in

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<sup>1</sup>Greenmoss Builders, Inc., is a Vermont corporation with no parent companies, subsidiaries or affiliates.

central Vermont. Reputation is important to Greenmoss since the overwhelming portion of its business has come from referrals.

Prior to Greenmoss' involvement with Dun & Bradstreet (hereinafter D & B), it never experienced economic difficulties and its business was on a steady upward climb. (Tr. 27-29)<sup>2</sup>

Greenmoss learned about the false report of its bankruptcy, circulated by D & B on July 26, 1976, in a most startling fashion. Greenmoss' president was at a local bank to discuss an additional line of credit for a new development. Greenmoss and the bank had a very favorable business relationship prior to D & B's publication of the bankruptcy report. (Tr. 40-44). As Greenmoss' President discussed the loan request, the bank officer handed him a D & B "Special Notice" declaring that Greenmoss had filed a voluntary bankruptcy petition. This was a false statement of fact. The report also grossly understated Greenmoss' assets and liabilities. The bank suspended action on the loan request until the matter of Greenmoss' status could be cleared up. (Tr. 54). The Bank was a subscriber to D & B's credit reporting service.

There then commenced a series of contacts between Greenmoss and D & B which prompted Greenmoss' claim at trial that D & B engaged in persistent, oppressive and outrageous conduct. After locating the D & B regional office responsible for the publication, Greenmoss' President spoke with a D & B representative who was not willing to accept Greenmoss' denial of the bankruptcy report

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<sup>2</sup>"Tr." signifies citations to pages of the separately-numbered trial transcript included in the Record.

and continually refused to divulge who had received the falsehoods. (Tr. 57-60). Greenmoss was repeatedly frustrated in its efforts to obtain this information. It was not until litigation ensued and formal discovery requests were submitted that the scope of the circulation of the false bankruptcy report was revealed. Thus, Greenmoss found itself in the untenable position of knowing that false notices of its bankruptcy had been circulated but was unable to obtain information about the breadth of the defamation.

The next series of communications Greenmoss had with D & B were equally unsatisfactory. About eight days after the bankruptcy notice, Greenmoss received a call from D & B advising that it had "confirmed" the falsity of the bankruptcy report and a so-called corrective notice was read.<sup>3</sup>

Greenmoss was most upset about the language of the so-called corrective notice, believing it to be almost as damaging as the bankruptcy notice. Greenmoss complained that the notice was inadequate and misleading in numerous respects and requested that it not be sent in that form. Notwithstanding Greenmoss' objections, the notice was sent in the form chosen by D & B. The so-called corrective notice stated in part that Greenmoss continued operations "as previously reported" which Greenmoss felt was very misleading in view of the gross inaccuracies in the assets

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<sup>3</sup>In its statement of the case, D & B asserts that it was not until August 3, 1976 that Greenmoss' President contacted D & B to advise it that the bankruptcy notice was in error and on the same date D & B issued a retraction. This does not square with the testimony in the case which was that Greenmoss called D & B in late July, 1976 and was told that D & B would "look into it". (Tr. 42-43, 54-55, 57-58, 65-68).

and liabilities reported in the false bankruptcy notice and the lack of a clear reference to what previous reports D & B was referring to. The bankruptcy notice had changed Greenmoss' rating to one that signified it had discontinued operations.

D & B did not retain fidelity to its own "corrective notice" since reports subsequent thereto changed Greenmoss' rating to a "blank rating" which meant that circumstances existed *at Greenmoss* that were difficult to classify under the D & B system (Tr. 382). The evidence was that circumstances had not changed at Greenmoss prior to these reports and that D & B had done no investigation prior to their publication. Prior to the bankruptcy notice, Greenmoss' D & B ratings had steadily improved.

D & B had established rules and procedures for verifying the truth of its information prior to publication which its own witnesses admitted were totally and completely ignored in Greenmoss' case. Moreover, D & B had data on Greenmoss prior to its decision to publish the bankruptcy report which served as notice that there was a high probability of falsity in the bankruptcy report made by D & B's Vermont correspondent.

Prior to the Greenmoss/D & B difficulties, the Clerk of the U.S. District Court in Burlington, Vermont, had been employed by D & B as its bankruptcy correspondent. (Tr. 261-267). The Clerk became concerned about a potential conflict of interest, informed D & B that he was resigning and suggested his own replacement; a sixteen-year-old high school junior whom the Clerk knew because she had mowed his lawn and done maintenance work around the house. (Tr. 268). She had never had an office job before and knew nothing about bankruptcy.

Without being interviewed by anyone at D & B, this youngster was hired at \$200 per year to replace the Clerk. D & B had no knowledge whether the Clerk instructed her about the job, what that training was, if any, and never made inquiry about her performance. There were never any job duties which emanated from D & B concerning her responsibilities. The evidence revealed numerous discrepancies between the bankruptcy petition the correspondent erroneously reviewed and the report she filed with D & B.

After the unsatisfactory dialogue with D & B concerning the corrective notice, Greenmoss, knowing that D & B personnel periodically called seeking information, instructed its employees and office personnel not to discuss the condition of the company with any D & B representatives. In subsequent reports, D & B circulated information that the Secretary (capital S) of Greenmoss "deferred financial information." In fact, this person was Greenmoss' receptionist who knew nothing about the company's condition and had been told not to discuss such matters. D & B persisted in such conduct. For example, Greenmoss requested a caveat in any D & B reports pointing out that, because of the defamation, Greenmoss had decided not to disclose its present financial condition to D & B. (Tr. 197). D & B refused to insert such curative language and in the next report following this request, cryptically reported "the secretary/treasurer of Greenmoss declined financial information". (Tr. 495-96). All of the information concerning D & B's change in Greenmoss' rating and its alleged deferrals and declinations to provide information were circulated to D & B's subscribers who requested information of Greenmoss.

Although D & B excerpts, out of context, segments of testimony on the quantum of compensatory damages, this issue is not before the Court. Beyond that, the trial Court, both after the trial and after the decision of the Vermont Supreme Court from which this Petition is taken, denied D & B's motions for judgment *NOV*. In addition, the Vermont Supreme Court upheld the Trial Court's post-trial rulings on the damage issue, ruling that D & B failed to preserve by appropriate motions at trial all questions based on the evidentiary support for the verdict.<sup>4</sup> Third, D & B, post trial, expressed no desire for relief based on remittitur.

Although the factual sufficiency for the claim that the bankruptcy notice affected Greenmoss' relationship with its bank is not before this Court, the evidence was that the bankruptcy notice came from D & B directly to the main branch of the Bank, that the loan officers who ultimately rejected Greenmoss' loan request (and, in addition, suggested that Greenmoss find another bank to do business with) were officers at the main branch whom D & B chose not to call as witnesses and the loan officer at the local branch could not say whether or not the loan officers who actually made the decision on Greenmoss' future banking relationship had seen the bankruptcy report. Greenmoss vigorously challenged the credibility of the local branch

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<sup>4</sup>In footnote 6 of D & B's Brief, it is asserted that "there is no record support for the statement of the Vermont Supreme Court that 'the bank put off any future consideration of credit to Plaintiff until the discrepancy was cleared up.' (J.A. 34-35)". Contrary to D & B's representation, Greenmoss' President testified twice that bank officials told him they would "not be going any further until this (the bankruptcy notice) was straightened out" (Tr. 54).

loan officer. The bank's decision to terminate not only the request for additional credit but also all banking relationships with Greenmoss, after having done business since 1973, came approximately two months after the publication of the bankruptcy notice. Additionally, Greenmoss introduced evidence that the bank it subsequently was able to establish a relationship with had no knowledge of D & B's reports.

## 2. The Proceedings Below

D & B's answer and affirmative defenses to Greenmoss' suit together with its pre-verdict memoranda bear close scrutiny since they reveal the theory upon which the case was presented to the trial court and the opportunities which D & B gave the trial court to frame the jury instructions to which it now claims entitlement. No constitutional parameters were asserted before trial. D & B's prime defense was that the defamatory statements were entitled to a common law commercial credit reporting privilege. This was an issue without precedent in Vermont.

Prior to the verdict, D & B never asserted the First and Fourteenth Amendments to the U.S. Constitution nor the extension of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) as an *independent or separate* basis for protection nor did it claim entitlement to *both* *Gertz* and the common law privilege. To persuade the trial judge to formulate jury instructions in accordance with a common law defamation privilege, D & B contended that the issue it now asserts as its only avenue to avoid the verdict was a "second rationale" which it said "underlies *some* court's decisions in favor of the creation of this qualified privilege." (D & B's Memorandum of Law Concerning Existence and

Nature of Qualified Privilege, Appendix C4-5, Greenmoss' Opposition to Petition for Writ of Certiorari.) (Emphasis added) It characterized *Gertz* as setting forth a standard that was coterminous with the common law qualified privilege. D & B's Requests to Charge the Jury were utilized by the Trial Court in large measure. Curiously, the portion of the charge D & B highlights as objectionable is derived verbatim from its own jury requests. *Compare* J.A. 19 *with* Defendant's Request to Charge Jury paragraph 3.

Because of the nature of this case, the manner in which it was presented to the trial Court and the Vermont Supreme Court's construction of the charge as a whole, the charge in its totality must be considered. Greenmoss would point out, however, that the punitive damage instructions were not solely confined to a punitive damage award arising out of the mere fact of defamatory publication. (J.A. 20). The charge on punitive damages allowed the jury to consider, wholly apart from considerations of defamation, the conduct of D & B toward Greenmoss after the publication with a view toward whether D & B's actions justified the deterrence of exemplary damages. (J.A. 21).

D & B objected to the Court's instruction on compensatory damages to the extent that those instructions related to libel *per se*, apparently believing that the common law privilege was conclusively established factually. Significantly, and contrary to the implication in D & B's Brief at page 7, D & B did *not* raise objections to the Court's instruction on punitive damages on grounds related to the issues here. Rather, apparently content with the legal standard which the Court planned to instruct, D & B contended the facts did not meet the test and moved

to dismiss the punitive claim solely on grounds of factual inadequacy. (Tr. 468-69). D & B objected to that portion of the punitive damage instruction that permitted the jury to consider D & B's conduct both before and after the publication of the erroneous report in deciding whether it acted with actual malice so as to support an award of punitive damages. (Tr. 493-494). Although the issue of the common law qualified privilege is not before this Court, the manner in which the trial Court handled the question is important to a proper understanding of the position of D & B here. The trial Court repeatedly instructed the jury that the qualified privilege was an obstacle which Greenmoss would have to hurdle in order to hold D & B liable and to justify the award of any damages. Reading the charge as a whole, it was only after the jury determined that the qualified privilege was abused by malicious or reckless publication, that the question of *any* damages, compensatory or punitive, could be considered. Thus, the use of libel *per se* language in the charge is surplusage.<sup>5</sup>

The Vermont Supreme Court, in construing the charge, ruled that, although *Gertz* was not applicable, D & B was afforded a charge which satisfied the constitutional privilege outlined in *Gertz*. As the Vermont Supreme Court ruled, "in short, D & B has nothing to complain about, since it received [a] beneficial charge[s] to which it was not entitled." (J.A. 46).

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<sup>5</sup>The libel *per se* language was in the charge to cover the possibility that the jury would find that D & B did not establish it was a credit reporting agency and thus did not carry its burden of proof on the application of the common law privilege.

## SUMMARY OF ARGUMENT

A. In attempting to extend *Gertz v. Robert Welch, Inc.* to non-media defendants in order to protect its credit reports, D & B misframes the issue. This case should be looked at as a commercial speech case. The issue is whether false and misleading statements of fact made by a commercial speaker in the course of its business should receive constitutional protection despite a state regulatory system that protects the target of such speech from false factual statements concerning the condition of its business. There is no difference between regulation of speech based on statute or administrative rule and regulation based on case precedent.

The speech involved here fits the classic mold of commercial speech. The speech is false and misleading and thus, can be severely restricted and even prohibited without running afoul of the First Amendment. The state did not prohibit the speech in this case and the restrictions placed upon it were not by way of prior restraint but rather focused on the subsequent financial responsibility of the speaker to the injured party. This is an appropriate position for a state to take in response to false commercial speech that damages its citizens. *Gertz* and *New York Times v. Sullivan* are inapplicable to such situations and should not be extended to cover them since to do so would depreciate and devitalize the First Amendment and the interests it protects particularly in defamation cases. If *Gertz* applies to this case, commercial speech will receive the full constitutional protection previously reserved for speech necessary about public issues and public debate. This speaker does not need the

breathing space allowed for false facts because there is no concomitant utilization of the type of speech which justifies giving leeway to falsehood. This speech has nothing to do with the political goals of the First Amendment nor of the criticism of government. It is not germane to arriving at a self-governing society. If *Gertz* applies, all lines between what is and what is not within the ambit of the First Amendment will be erased and commercial speech will ascend to the same status as *New York Times* speech. This Court's careful development of First Amendment doctrine in the area of commercial speech will be frustrated.

B. Even if D & B has focused on the right issue and the extension of *Gertz* in the non-media context should be discussed, D & B has used the wrong analysis to advance that proposition. *Gertz* itself does not apply to non-media defendants in language, holding, rationale or concept. Thus, the Court must extend *Gertz* to cover non-media defendants like D & B. There is no reason to do that and it would be bad policy. Non-media defendants are already constitutionally protected to the level of *New York Times* standards if they are sued for defamation by public officials or public figures. Thus, the only defamation area left open by the case progression from *New York Times* through *Gertz* is purely private defamation, i.e., suits by purely private plaintiffs against non-media defendants. The considerations which prompted this Court in bringing the First Amendment into defamation law should be carefully focused upon to see if they are relevant to purely private defamation. When so considered, the total lack of genuine First Amendment issues becomes evident where a defendant like D & B is involved.

If *Gertz* is extended to non-media defendants, the First Amendment standards mandated by *New York Times* will apply in every defamation case tried in this country. This headlong rush to symmetry will be the death knell of reputational interests of our citizenry, even in states like Vermont which constitutionally protect reputation. Because of the fabric of common law in most states, extension of *Gertz* to non-media defendants will give commercial credit rating agencies more protection than any speaker, including the press, with no corresponding increase in protecting the issues for which the Framers drafted the First Amendment. The present formula constitutionally protects enough speech that fosters First Amendment ideals. Extending *Gertz* to all non-media defendants will protect too much speech that has nothing to do with the First Amendment and provide protection to very little that does.

C. The absence of any involvement or implication of the press renders this private defamation case without relevant precedent in First Amendment methodology. D & B's exclusive reliance on the speech clause in the First Amendment is not enough to broaden *Gertz* beyond its holding since the press involvement was an indispensable component of the *Gertz* formula. If the Speech Clause protects the type of speech in this case, the Press Clause will be a redundant, functionless appendage. This is contrary to the intent of the Framers.

D. This case builds a constitutional mountain out of an argument advanced at trial as a secondary "make weight" to persuade the trial judge to apply a common law privilege to credit reporting agencies. D & B never gave the lower court the chance to independently consider

*Gertz* since it did not assert the First Amendment as an independent basis for protection. Thus, a case tried as a common law libel case is now sought to be the vehicle for one of the major constitutional issues of our jurisprudence. The issue raised by the Petition was not preserved and presented in a manner commensurate with a litigant's advocacy responsibility and is thus foreclosed.

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#### ARGUMENT

**I. DUN & BRADSTREET IS NOT ENTITLED TO THE FIRST AMENDMENT PROTECTIONS ESTABLISHED IN GERTZ V. ROBERT WELCH, INC.**

**A. The Statements Made By Dun & Bradstreet In This Case Which Gave Rise To Its Liability For Damages Are Erroneous And Misleading Statements Of Fact Made In Connection With A Commercial Transaction And Are Therefore Not Entitled To Constitutional Protection.**

Greenmoss submits that the issue framed by the Petition is inadequate. Resolution of this case need not involve the extension of *Gertz* to a non-media defendant, even a non-media defendant like D & B. Similarly, the boundaries of any media/non-media distinction and the appropriateness of such a distinction need not be explored here. This case can be more properly decided by reference to constitutional standards involving commercial speech and commercial speakers. What makes this case particularly unsuited for discussion of the issue

framed by the Petition is the fact that D & B is not representative of the class of non-media speakers and, indeed, is a peculiar advocate to advance the cause of constitutional interests of non-media speakers. *The proper issue here is whether admittedly false and misleading commercial speech should receive constitutional protection against money damages awarded pursuant to a state regulatory scheme which stringently protects businesses from false and deceptive statements of fact about the condition of their business.* Greenmoss contends that the Constitution should not invade this area and, as to this Petitioner, traditional common law protections are entirely appropriate and adequate. The defamation here constituted trade libel under traditional notions since on its face it directly affected Greenmoss' business.

It must be precisely recognized the types of statements for which D & B attempts to obtain First Amendment protection. It is conceded by D & B that the defamatory statements it made about Greenmoss in reporting the bankruptcy were false and inaccurate statements of *fact*. They had no panache of opinion nor did they invite debate. What is before the Court are simply false and misleading statements of fact, made in a commercial milieu, which D & B admits were negligently and carelessly made. It is speech exclusively in the economic interest of the speaker (D & B) and its audience (D & B's private, paid-in-advance subscribers).

The reports in this case constitute commercial speech. They involve and are about business. The audience is not one of general demography. It is a limited, finite, selective, business audience that makes contracts in advance to obtain, on pre-arranged terms and conditions, reports to

assist it in evaluating commercial transactions. Indeed, this is the nature of the commercial transaction proposed by D & B. The information gathered does not relate to opinion nor does the audience expect that it will contain opinion. The reports are not, strictly speaking, in the economic interest of the speaker. The speech D & B seeks to protect does not even propose a commercial transaction. The speech here is the culmination or product of a previous proposal of a commercial transaction, a proposal which D & B's audience accepted because it needed veracity about a given subject. The speaker gets paid directly and exclusively by the audience to provide facts that are easy to verify. This remuneration is based on creating a large, elaborate system for collecting and verifying these facts. D & B is, as it contended at trial, the largest credit reporting agency in the world (Tr. 373). Because this speaker is in the marketplace of facts and not ideas, and in part because it has the opportunity to make contracts in advance with its audience, it is not faced with any dilemma of publishing or remaining silent and it can spread costs of doing business among its many subscribers.

The fact that Vermont has chosen to regulate this speaker by case precedent rather than by statute or regulation and regulates the speaker by financial responsibility rather than prior restraint is constitutionally irrelevant.

*Gertz* recognizes that there is "no Constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 340. A false fact, carelessly and negligently made, is not an "essential part of any exposition of ideas and [is] of such slight social value as a step to the truth that any benefit that may be derived from them is clearly

outweighed by the social interest in order and morality." 418 U.S. at 340. *See also Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel*, 425 U.S. 748 (1976) (untruthful speech has never been protected for its own sake.) *Id.* at 772, n. 24.

In the instant case, totally unlike *New York Times v. Sullivan*, 376 U.S. 254 (1964) and its progeny, including *Gertz*, a commercial speaker seeks the protections which have heretofore been recognized by this Court solely in the context of media or press defamation or in actions involving public officials or public figures.

*Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), validated a state regulatory system which fostered truthfulness where commercial speech was involved. The Court evidenced minimal concern that regulation to assure truthfulness in commercial speakers would discourage such speech and focused on the commercial speaker's knowledge of his product and his business interest in its dissemination. 483 U.S. at 383. Citing *Gertz*, the Court declared "the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena." *Id.*

*Bates* rejects the interest in spontaneity of commercial speech on reasoning particularly appropriate to the instant case. Commercial speech is generally "calculated" and thus "strict requirements for truthfulness" are appropriate. *Id.* at 383. Here, the product D & B sells is *accurate* data about the business of others. Its subscribers would have it no other way. They do not want to be stimulated by ideas and opinions from D & B. A spontaneous comment in such a report, if factually incorrect or mis-

leading, could have untoward economic consequences for them. D & B's audience is not interested in D & B's freedom of expression or in its political statements. The audience wants veracity and D & B has responded to this need by building a broad based information gathering network which is oriented to the collection of facts.

Commercial speech occupies a lower place in the First Amendment hierarchy than non-commercial expression. *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978). *Ohralik* posits that the constitutional distinction between commercial expression and non-commercial expression rests on the idea that commercial expression is of less constitutional moment than other forms of speech. *Ohralik* retreated from even the limited protection of commercial speech granted in *Bates* and held that entire classes of commercial speech *necessarily including some harmless speech* could be prohibited where allowing the speech would be likely to result in some deception. 436 U.S. at 464-67. Justice Powell, writing for the Court, observed that the protections of *New York Times v. Sullivan* might not be needed for commercial speech, specifically comparing *New York Times* with *Dun & Bradstreet v. Grove*, 438 F. 2d 433 (3rd Cir.) *cert. denied*, 404 U.S. 898 (1971). The objectivity, hardness, ease of verification and the speaker's knowledge of the product or service about which the speech is made all militated against the *Ohralik* Court's tolerance of false commercial speech merely to protect some speech that may have tangential First Amendment significance.

*Dun & Bradstreet v. Grove*, *supra*, holds that a private subscription credit report is "not a medium entitled

to the extended constitutional protection of the *New York Times* doctrine." Like *Grove*, most of the lower courts which have focused on the commercial nature of credit reports have analyzed those reports as a genre of commercial speech lying beyond the protection of the First Amendment. *Oberman v. Dun & Bradstreet*, 460 F. 2d 1381 (7th Cir. 1972); *Kansas Electric Supply Company v. Dun & Bradstreet*, 448 F. 2d 647 (10th Cir. 1971), cert. denied 405 U.S. 1026 (1972); *Millstone v. O'Hanlon Reports, Inc.*, 528 F. 2d 829 (8th Cir. 1976); *Hood v. Dun & Bradstreet, Inc.*, 482 F. 2d 25 (5th Cir. 1973), cert. denied 415 U.S. 985 (1974); *Wortham v. Dun & Bradstreet, Inc.*, 399 F. Supp. 633 (S.D. Tex. 1975) aff'd., 537 F. 2d 1143 (5th Cir. 1976).<sup>6</sup> Professor Maurer concludes that the analysis used in these decisions parallels the contemporary pronouncements of this Court on the constitutional status of commercial speech. See Maurer, *Common Law Defamation and The Fair Credit Reporting Act*, 72 Georgetown L.J. 109 (1983).

*Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557 (1980), announced a balancing test for commercial speech to determine whether such speech, despite its depreciated constitutional status, is, nonetheless, entitled to some First Amendment protection. Whether protection is available for a particular commercial expression turns on the nature of the expression and the government interest served by its regulation. This test was further explained in *Metromedia, Inc. v.*

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<sup>6</sup>It should be noted that many of the cases cited herein rely, in part, upon the now rejected public interest analysis utilized in *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971).

*City of San Diego*, 453 U.S. 490 (1981). The court explained *Central Hudson* as having

adopted a four part test for determining the validity of government restrictions on commercial speech as distinguished from more fully protected speech. (1) the First Amendment protects commercial speech *only* if that speech concerns lawful activity *and is not misleading*. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial government interest, (3) directly advances that interest, and (4) reaches no farther than necessary to accomplish the given objective.

453 U.S. at 507 (citations omitted) (emphasis added).

In applying those rules to this case, Greenmoss submits that one need go no further than the first step of the analysis. *Central Hudson* and *Metromedia* posit that if commercial speech is to receive any protection under the First Amendment, the speech must not be misleading. The bankruptcy notice published by D & B in this case, far worse than being misleading, was totally and completely false, not merely as to the fact of the bankruptcy, but also as to the level of Greenmoss' assets and liabilities. D & B's further commercial statements in this case, undertaken after the false report of bankruptcy, are an unattractive combination of both false and misleading statements.

Consequently, the speech sought to be protected here does not satisfy the threshold test to obtain even the minimal degree of protection provided to commercial speech by the First Amendment. Therefore, the state of Vermont, by its case precedent, had the power to stringently regulate and even exclude such speech. The state, of course, did neither since the trial Court made the com-

mon law privilege an obstacle to recovery of any damages whatsoever. Even assuming, for the purpose of argument, that the jury instructions permitted *per se* damages without any showing of fault,<sup>7</sup> which Greenmoss vigorously contests, and further assuming that such an instruction can be said to exclude speech, the *Central Hudson* test permits such treatment of this speech. Of course, Vermont did not exclude or restrain D & B's speech in advance, but rather, required that D & B be financially responsible for the reputational damage to Greenmoss.

One need not advance to the remaining three criteria of *Central Hudson* if the speech sought to be regulated is misleading. Under *Central Hudson*, if the speech misleads, it can be *severely* regulated or prohibited entirely. However, application of those criteria to this case reveals interesting dimensions.

The government interest in protecting its citizens' reputational rights is a substantial interest, as this Court recognized in *Gertz*. Such considerations apply with even greater force here since reputation has constitutional protection and recognition in Vermont. The Vermont Constitution provides that:

Every person within this state ought to find a certain remedy, by having recourse to the laws, for *all injuries or wrongs which he may receive in his person, property, or character . . .* Vermont Constitution, Chapter 1, Article 4th. (Emphasis added.)

That the framers of the Vermont Constitution believed personal reputation to be of such importance to insert it

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<sup>7</sup>As Greenmoss points out in this brief, libel *per se*, as used in the jury charge, gave Greenmoss nothing and did not prejudice D & B.

in the Vermont Constitution is definitive evidence of the substantial nature of the governmental interest in the protection of reputations in Vermont.

The assessment of compensatory and punitive damages under the instructions given by the trial court directly enhance the governmental interest in protecting reputation and guarding its citizens against persistent, insulting, oppressive conduct in that there is a deterrent effect, long recognized in the Vermont cases, in assessing punitive damages. It is quite significant that the jury instructions permitted consideration of D & B's conduct both before and after the publication of the erroneous report. This gave the jury the opportunity to gauge the nature of D & B's actions *independently* of the mere fact of a single defamatory publication. In other words, Vermont and other states have a strong interest in deterring repeated, harassing and persistent conduct taken against their citizens. The trial Court's instructions, which permitted the jury to assess the propriety of that conduct and the consequences for engaging in it, directly advanced the state's interest in deterrence totally apart from issues of publication of defamation which is the only issue triggering First Amendment concerns here.

The instructions on mitigation of damages focused upon the jury's discretion whether to award any punitive damages at all and if so, the amount of the award. The mitigation instructions, which were quite extensive, allowed punitive damages to reach no farther than necessary to accomplish the state's objectives. *cf. Central Hudson, supra.* Moreover, the mitigation instructions placed two limitations on any allegedly unlimited discretion given to juries in the punitive damage area. The first was that

any action undertaken by D & E to mitigate Greenmoss' damages was to be considered by the jury on the threshold question of whether or not to award any damages of a punitive nature. The second limiting instruction was that if the jury found that D & B attempted to mitigate damages, any punitive damage award must be accordingly lessened.

In view of the foregoing, the test for granting commercial speech any First Amendment protection advanced in *Central Hudson* is not satisfied. Thus, D & B's commercial speech should not receive any First Amendment protection.

Additionally, contrary to the apparent assumption made by D & B, the jury instructions on punitive damages embraced and encompassed common law notions of exemplary damages for actions of D & B which were extrinsic from and unrelated to the publication of the defamation. Those instructions were not limited solely to consideration of D & B's publication of a defamatory statement but brought into play other conduct of D & B violative of Greenmoss' rights.

Even if credit reports fall within the realm of protected commercial speech, it does not necessarily follow that credit reporting agencies will be afforded the full protection of *Gertz* and *New York Times* because commercial speech, under settled doctrines, is accorded less protection than other constitutionally guaranteed speech. See Maurer, *supra*, at 110.

As Professor Shiffrin, a noted commentator on the First Amendment points out, "prohibitions of false or misleading speech are always permitted." See Shiffrin,

*The First Amendment and Economic Regulations: Away From a General Theory of the First Amendment*, 73 Northwestern L. J., Volume 5, at Page — (1984).<sup>8</sup> (Hereinafter Shiffrin, *The First Amendment*).

*Gertz* instructs that erroneous statements of fact receive protection only because they are inevitable in the context of *free debate* to protect the type of speech which is important to First Amendment liberties. False factual reports about a business filing for bankruptcy do not invite free debate. D & B's audience would be radically diminished if it were advised that D & B needed "breathing space" to commit error to satisfy its own self-expression. D & B wants breathing space to obtain financial protection against errors, not so that it can contribute to robust debate on First Amendment issues. Thus, as will be discussed *infra*, there are no protected First Amendment interests which this Court has acknowledged in the area of defamation that can be advanced to support a claim that the Constitution should protect these concededly false facts. The defamation in this case had nothing to do with public issues, political self-government, ideas, self-expression, discovery of truth or exposition of opinion. Note, *Constitutional Protection of Commercial Speech*, 82 Columbia L. Rev. 720, 731 (1982). These reports relate to assets, liabilities, bank accounts, identification of officers and principals and other easily verifiable facts. They do not propose a commercial transaction in themselves. They

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<sup>8</sup>Professor Shiffrin's comprehensive comments on commercial speech were presented at a symposium at Northwestern University Law School. The presentation is to be published in the forthcoming volume (No. 5) of the Northwestern University Law Journal. When published, Greenmoss will provide appropriate page citations.

are not, strictly speaking, statements in the economic interest of the speaker, although the speaker does derive economic profit from their circulation.

In *Ohralik*, the Court worried that “the failure to distinguish between commercial and non-commercial speech could invite dilution of non-commercial speech simply by a leveling process of the force of the First Amendment protections with respect to non-commercial speech.” 436 U.S. at 456. Mr. Justice Rehnquist, dissenting in *Bates*, observed that invoking the First Amendment to protect advertising of goods and services, however truthful or reasonable, would “demean” the First Amendment. The speech clause was intended as a “sanctuary for expressions of public importance or intellectual interest.” 433 U.S. at 404. Because D & B does not frame the issue in this case correctly, it fails to perceive that extending *Gertz* to this type of commercial speech will effect precisely such a degradation of the First Amendment.

A ruling that the *Gertz* protections do not apply to commercial credit reporting agencies will not send the nation’s trial Courts off on an *ad hoc* journey into often abstract line drawing. Thus, the mischief for which this Court in *Gertz* criticized the decision in *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971), will not occur. In *Gertz*, the Court was concerned that the *Rosenbloom* “general or public interest” test and its “information relevant to self-government” tests would force judges into deciding on an *ad hoc* basis which publications qualify for First Amendment Protections and which do not. See 418 U.S. at 346. As Professor Shiffrin cogently points out, “drawing lines based on underlying First Amendment values is a far cry from sending out the judiciary on a general *ad hoc*

expedition to separate matters of general or public interests from matters that are not. A commitment to segregate certain commercial speech from *Gertz* protection is not a commitment to general *ad hoc* determinations. The costs of uncertainty in the line drawing process are outweighed by respect for state interests and unnecessary trivialization of First Amendment concerns.” Shiffrin, *First Amendment, supra*, at —. The line to be drawn here is simple and straightforward. If it is not drawn to exclude this Petitioner, the absolutist’s view of the First Amendment will finally prevail and over-the-fence gossip, no matter how injurious to a private individual’s reputation, will be within the coverage of the First Amendment. The failure to draw lines would totally upset the balancing approach which this Court is committed to in weighing the competing interests at stake between an individual’s reputational rights, particularly when they are recognized in the state constitution, and First Amendment protections.

One final aspect of analyzing this case in terms of commercial speech is that the state’s power to regulate the type of commercial conduct that it deems permissible can be analyzed in terms of the cost of doing business in that particular state. *The extension of Gertz suggested by D & B would, of course, eradicate all state’s common laws of libel per se, for all plaintiffs against all defendants.* In those states, like Vermont, which choose not to extend protection to erroneous commercial statements of fact, the cost of doing business for a company like D & B may or may not be higher than in states which protect such business. The evidence is, of course, inconclusive. However, it was never the purpose of the First Amendment

to allow businesses to operate in all states at the same cost. Vermont should remain free to decide for itself whether or not, consistent with the tests announced in *Central Hudson Gas & Electric* and *Metromedia v. City of San Diego*, this form of commercial speech should be protected.

For the above reasons, Greenmoss submits that this case should be analyzed on a commercial speech basis and, when so analyzed, the protections in *Gertz* should not be extended to commercial credit reporting businesses.

**F Gertz v. Robert Welch, Inc. Should Not Be Extended To Protect This Non-Media Petitioner.**

Although D & B repeatedly seeks to create the impression that the Vermont Supreme Court ignored the holdings in *Gertz* and, acting on its own, drew a distinction between media and non-media defendants, such implication ignores reality. The Vermont Supreme Court is not the progenitor of the distinction between media and non-media defendants. Justice Powell's carefully worded opinion in *Gertz* is patently limited only to cases in which there is a media defendant. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 347, Note, *Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Non-Media Defendants*, 95 Harv. L. Rev. 1876, 1877 (1982).

There is no ambiguity in *Gertz*. The decision does not textually or methodologically apply to defamation by a non-media defendant. Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349, 1417 (1975); Brosnahan, *From Times v. Sullivan to Gertz v.*

*Welch: Ten Years of Balancing Libel Law and The First Amendment*, 26 Hastings L.J. 777, 792-793 (1975).

Any doubt that *Gertz*'s holding is limited solely to media defendants is dispelled by subsequent observations of this Court. *Babbit v. United Farm Workers National Union*, 442 U.S. 289, 309 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111, 113 n. 16 (1979). The context of the statements in *Babbit* and *Hutchinson* about *Gertz*'s limits makes it clear that the Court in each case was referring to suits by private plaintiffs against non-media defendants especially since the application of the First Amendment in suits by public officials and public figures against non-media defendants has already been resolved. Thus, D & B's attempt to establish the affirmative out of a negative, i.e., the omission of a specific exclusion of non-media defendants as a ruling that non-media defendants are covered by *Gertz*, fails to appreciate the sophistication of the *Gertz* opinion. The fundamental methodology of *Gertz* adopts a balancing test which recognizes that accommodations must be struck between the interests that states have in protecting *private* individuals from defamation and the values the First Amendment protects when the media is involved in defamation suits as those values have been identified by this Court in *New York Times* and its progeny. Vermont has strong interests in protecting private individuals from defamation. This is not only a settled doctrine in Vermont case law, *Darling v. Clement*, 69 Vt. 292, 37 A. 779 (1897); but, far more significantly, has constitutional recognition. Vermont Constitution, Chapter 1, Article 4th. *Gertz* does not rely upon any state constitutional provision for its acknowledgement that private individuals should be compensated for wrongful injury to reputation, 418 U.S. at 348.

Faced with an *a fortiori* case for vindicating personal reputation, the question for consideration here is what First Amendment values can D & B legitimately identify, *especially in the context of this Court's decided cases on defamation and the First Amendment, that make down-weight against the strong state interest in reputational protection acknowledged in Gertz and enhanced by the Vermont Constitution!* Greenmoss submits that there are no First Amendment values which would justify the extension of *Gertz*'s protection to this Petitioner.

In its effort to find some interest protected by the First Amendment, D & B draws on cases which have nothing to do with defamation. Its difficulty in identifying a relevant First Amendment concern highlights the inappropriate framing of the issue raised by the Petition. "Each medium of expression must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." *Metromedia v. City of San Diego*, 453 U.S. 490, 501, n.8 (1981).

After a probing analysis of First Amendment precedent, Professor Shiffrin concludes that the structure of First Amendment doctrine varies depending on the context and issue before the Court. "The assumption of general balancing", posits Professor Shiffrin "is that the values of speech interact with other values in such complicated ways that the Court may need discrete doctrinal tools to resolve particular problems." Shiffrin, *The First Amendment, supra*, at —.

Empty abstractions about the First Amendment, such as those asserted by D & B, have no meaningful role in the utilization of the balancing process. "To make a bal-

ancing approach meaningful, we must think in narrower terms, recognizing that the strengths of the competing interests may vary in new contexts." Karst, *The First Amendment and Harry Kalven: An Appreciative Comment on the Advantages of Thinking Small*, 13 U.C.L.A. L. Rev. 1 (1965), cited in Shiffrin, *Id.* at —.

Accordingly, to properly analyze the issue asserted by Petitioner, it is necessary to identify the doctrinal foundations of the First Amendment, not as vague, elusive concepts and potential panaceas for all ills, but as a source of the real tension created between those foundations and the law of defamation.

*New York Times v. Sullivan* emanates from a "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open. 376 U.S. 254, at 270. (emphasis added). In the oft-maligned phrase which has caused so much contradictory scholarship, the Court observed that the "central meaning" of the First Amendment renders prosecutions for libel on government abhorrent to the American system of jurisprudence. *Id.* at 291-92. The rationale of *New York Times* is rooted in a fundamental respect for the right of the people to criticize the government. Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 U.C.L.A. L. Rev. 915, 922 (1978). (Hereinafter Shiffrin, *Non-Media Speech*).

D & B surprisingly contends that unless *Gertz* is extended beyond media speakers, other speakers would be subject to unlimited exposure for defamation, even where no actual malice existed. D & B Brief at 17. This contention is incorrect and ignores the fact that the logic of

*New York Times* compels its application to defamation of public officials and public figures by non-media defendants. See Eaton, *supra*, at 1406. Predictably, the cases have so held. *Henry v. Collins*, 380 U.S. 356 (1965); *St. Amant v. Thompson*, 390 U.S. 356 (1968). Therefore, the liability of non-media speakers is not unlimited; non-media defendants receive the same protections in suits brought against them by public officials and public figures as do media defendants. Thus, the issue in this case is much narrower than D & B would have the Court believe. It is only where a private plaintiff is involved that the *New York Times* protections would not be available to a non-media defendant.

The crucial elements which bring the First Amendment into conflict with defamation law are missing where the plaintiff is not a public official or public figure and there is no media defendant. First, there is no threat to the free and robust debate on public issues. D & B does not contend that its defamatory statements have anything to do with free and robust debate on public issues. Secondly, there is no potential interference with the meaningful dialogue of ideas concerning self-government. Again D & B does not argue that its speech has anything to do with self-government. Third, in defamation law, the threat of liability causing a reaction of self-censorship, at least when the press is involved, causes First Amendment tension. *Gertz*, 418 U.S. at 350. D & B does not contend that it fears self-censorship if *Gertz* protections are not provided. It is certainly not obvious that self-censorship will occur with a huge commercial enterprise such as D & B. Indeed, it has been suggested that self-censorship is not a real threat in the case of a credit reporting agency. *Hood*

*v. Dun & Bradstreet, supra*; Note, *Libel and Self-Censorship*, 53 Tex. L. Rev. 422, 442-43 n. 96 (1975). Since these reports deal with fact and not opinion, veracity, which is the reason credit reporting businesses prosper, achieves the mutual goals of immunizing against liability and creating the financial security to vigorously respond to contested claims.

From the standpoint of policy, the decision not to extend *Gertz* to non-media defendants should not really be a troublesome matter since in most non-media cases, particularly those which involve credit reporting agencies, common law privileges are usually applicable. In fact, extending *Gertz* to a non-media commercial credit rating agency will have the paradoxical result of providing such a defendant with even more protection than is afforded to the media.<sup>9</sup>

A major difference between media and non-media speakers is that the restrictive nature of the publication by a non-media speaker, even though perhaps broadly disseminated, denies, in large part, any possible means of reply in the medium which caused the defamation. Some access to the defaming medium for reply and rebuttal was assumed to be available to the defamed individual by the Court in *Gertz*. 418 U.S. at 344. Although rebuttal may

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<sup>9</sup>For example, compare *Gobin v. Globe Publishing Company*, 216 Kan. 223, 531 P. 2d 76 (Kan. 1975) (negligence required to award any compensatory damages in litigation involving private plaintiff and media defendant) with *Kansas Electric Supply Co. v. Dun & Bradstreet, Inc.*, 448 F.2d 647 (10th Cir. 1971) cert. denied, 405 U.S. 1026 (1972) (applying Kansas Law) (Plaintiff must prove wanton and reckless conduct to recover any compensatory damages against commercial credit reporting agency).

be inadequate, it is certainly not irrelevant. 418 U.S. 344 at n.9. In this case, the very nature of the credit reporting medium admits of no access for any realistic opportunity to counteract false statements of fact. Indeed, Greenmoss' efforts at access to the D & B medium as a self-help remedy were refused. In addition to lack of access to the non-media speaker's medium to effect the remedy of self-help, the identification of a credit reporting agency as the source of defamatory publications may never be exposed and its proximate causation difficult to pinpoint but the damage is inflicted nonetheless. The *Grove v. Dun & Bradstreet* court referred to these considerations as the "pernicious" effects of non-media defamation. 438 F.2d at 437. Compare this with the immediacy of awareness of publication where media defendants are involved.

If *Gertz* is extended to non-media speech, the result will be to protect much speech having nothing to do with public issues while safeguarding relatively little that does. Consistent with the focus of this Court in First Amendment defamation cases, it is appropriate that some public speech go unprotected lest too much non-public speech be unnecessarily safeguarded. *See Shiffrin, Non-Media Speech, supra* at 929-930.

Because defamatory non-media speech has been constitutionalized to the extent that it involves public figures and public persons, there is consistency to the *New York Times/Gertz* formulation that debate on public issues be sufficiently robust and wide open for First Amendment purposes. This construction validates the commitment to a politically based interpretation of the First Amendment

in defamation cases and does not afford unnecessary protection to speech not relevant to public issues. Shiffrin, *Id. See also, Eaton, supra* at 1408.<sup>10</sup>

D & B's contention that the *Gertz* standard should be extended to it to "avoid punishing the free flow of information" is both inapposite and ironic. The cases cited in support of that proposition simply have nothing to do with the tension between the First Amendment and defamation. The irony is that D & B's publications are very limited access publications which are inimical to providing information on a general basis. Their stated purpose is contrary to both the *New York Times*' rationale of free and uninhibited debate on public issues and the facilitation of the free flow of information since their use is conditioned upon maintaining confidentiality.

D & B also advances the spectre that a failure to extend *Gertz* to non-media defendants will force judges into difficult *ad hoc* rulings. Once again, D & B advances a cause which is not its own. D & B has never contended that it is a media defendant and there is a "common sense distinction" between the commercial speech involved here and other varieties of speech. *Central Hudson Gas & Electric*, 447 U.S. at 562. This attempt at eradicating all line drawing is a subterfuge for asking this Court to abandon the balancing methodology utilized in First Amendment cases.

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<sup>10</sup>In this context, D & B's reliance upon *Henry v. Collins*, 380 U.S. 356 (1965) is misplaced since the plaintiffs in *Henry v. Collins* were public officials. Additionally, several of the communications which the Court held were entitled to *New York Times* protections in *Collins* were telephone statements to reporters for publication which followed in newspapers. *See Henry v. Collins*, 253 Miss. 34, 42-44, 158 So. 2d 28, 30-31 (1963).

ment defamation cases. The line drawing to be done has boundaries measured by First Amendment/defamation considerations already decided by this Court. Secondly, D & B's suggestion shows minimal confidence in judges, who draw lines *within recognized parameters* every day.

The media/non-media distinction, frets D & B, is a device for protecting political messages and is thus content regulation in disguise. D & B's unstated assumption is that content regulation is always constitutionally prohibited. This is not so. *Young v. American Mini Theaters*, 427 U.S. 50, 66-70 (1976) (the question whether speech is or is not protected by the First Amendment "often" depends on its content). Focusing on content is particularly appropriate with commercial speech. *Bates v. State Bar of Arizona*, *supra* at 463 (commercial speech "must" be distinguished by its content). Moreover, even if some content is regulated by the media/non-media dichotomy, this is appropriate policy in defamation litigation, drawing upon the fundamental predicates of *New York Times* which is based upon protecting political messages and fostering debate on public issues. *New York Times* advances a politically based interpretation of the First Amendment. Shiffrin, *Non-Media Speech*, *supra* at 923-24. *By protecting public figures, public officials and media defendants, the goal of fostering debate on public issues should be sufficiently robust and wide open for First Amendment purposes without extending it to non-media defendants.*

It is not necessary in this case to decide whether *Gertz* should be extended to all non-media defendants. It need only be decided whether non-media defendants such as

D & B should be extended the protections of *Gertz*. Greenmoss submits that *Gertz* should not be extended. Its limitation to the media is intentional, workable and rational and provides a legitimate demarcation point for protecting First Amendment interests. To hold otherwise would unwisely and unnecessarily adjust the balance between the First Amendment and reputational protection.

**C. The Rules Fashioned In *Gertz* Should Not Be Extended In This Case Since The Press Or Media Is Not A Party And There Are No Overtones Of Press Involvement.**

This Court has never decided a defamation case involving a purely private plaintiff and a non-media defendant who has no connection with the press or in which there are no press overtones. Eaton, *supra*, at 1404 n. 228.

The commentary by Mr. Justice Stewart and the opinion in *Gertz* intimate that *New York Times* may be primarily a free press case. Mr. Justice Stewart, *Or of the Press*, 26 Hastings L.J. 631 (1975); Shiffrin, *Non-Media Speech*, *supra*, at 916, 923-24. Mr. Justice Stewart concludes that "The Court has never suggested that the constitutional right of free speech gives an *individual* *any* immunity from liability for either libel or slander. *Id.* at 635. See also, *Monitor Patriot v. Roy*, 401 U.S. 265, 270 (1971) "the role of *New York Times* was based on a recognition that the First Amendment guarantee of a free press is inevitably in tension with state libel laws."

Mr. Justice Stewart stresses that this Court's libel cases *are decided in the context of the guarantee of freedom of the press*. Freedom of the press is a structural provision of the Constitution and, in contrast to the pro-

tection of other liberties, protects an institution. Stewart, *supra*, at 633-35. When the element of freedom of the press is absent, the private reputational interests of a plaintiff like Greenmoss make downweight against the constitutional interests. Thus, absent the involvement of the press, the *New York Times/Gertz* doctrines should not apply. Stated otherwise, the balancing test utilized in *Gertz* cannot simply be transferred *in toto* to this case since the balance is entirely upset when there is absent from the equation a media defendant or media involvement.

Recently, the Court has focused upon the explicit guarantee of freedom of the press and its importance to the Framers of the Constitution. *Minneapolis Star v. Minnesota Commission of Revenue*, — U.S. —, 103 S. Ct. 1365 (1983). The renewed interest in the importance of the press clause, Justice Stewart's comments and a brilliant historical analysis of the press clause by Professor Anderson prompt a careful examination of whether involvement of the press is a significant Constitutional factor in the area of defamation.

"The Court has not yet squarely resolved whether the Press Clause confers upon the 'institutional press' any freedom from government restraint not enjoyed by all others." *First National Bank v. Bellotti*, 435 U.S. 765 at 798 (1978) (Burger, J. concurring). Professor Anderson's scholarly work is particularly noteworthy on the question of the primacy of the Press Clause. Anderson, *The Origins of the Press Clause*, 30 U.C.L.A. L. Rev. 455 (1983). To the Framers, the Press Clause was primary and the Speech Clause was secondary. *Id.* at 487. Since the press was expected by the Framers to be the primary source of

restraint against government power, and speech was an afterthought as a means of checking government power, the theory of *New York Times* and *Gertz* and the limitation in *Gertz* to media defendants have strong historical foundation.

The historical antecedents of the importance of the press demonstrate that freedom of speech and freedom of the press are not interchangeable, that they are not a constitutional redundancy and most significantly, that removing the press from the equation in First Amendment defamation litigation eviscerates such a significant portion of the *New York Times/Gertz* formula that individual reputational rights assume dominance over the interests of those who do not claim to be members of the press.

**II. DUN & BRADSTREET DID NOT PRESERVE AT THE TRIAL COURT LEVEL THE ISSUE PRESENTED BY THIS PETITION AND ITS CONSIDERATION IS THEREFORE FORECLOSED.**

Prior to the jury's decision, D & B did not assert *Gertz* as an independent basis for protection. It was solely and exclusively in the context of the common law privilege that D & B suggested the First and Fourteenth Amendment and *Gertz* had *any* application to this trial. Significantly, D & B never asserted at the trial Court level that it was entitled to *both* the protection of *Gertz* and the protection of the common law privilege; it characterized *Gertz* as setting forth a standard that was equivalent to common law privilege and as a "second rationale" for applying the privilege. Accordingly, this case was presented to the trial court and was tried as a common law libel case

with the claim of a qualified defamation privilege of a credit reporting agency as a crucial defense. From all that appeared at trial, there were no overtones of any independent First Amendment protection. Once the trial Court acknowledged that a qualified common law privilege was to be charged, which was an open question in Vermont, D & B was satisfied that it had sufficient protection. D & B gave the trial Court no opportunity to apply *Gertz* as an independent basis for protection. In the objections to the charge, both before and after its delivery, there was no mention of the doctrines advanced in *Gertz*.

Because D & B never put the trial Court on notice that it claimed a separate basis for absolution from liability grounded on the First and Fourteenth Amendments, the issue presented by this Petition is foreclosed.

Litigants have an obligation to adhere to the theories pursued at the trial Court level and theories not pursued there ordinarily will not be entertained on appeal. *Youakim v. Miller*, 425 U.S. 231 (1976). Questions that are not properly raised and preserved during trial proceedings are normally considered waived and parties cannot assign as error trial court's failures to give instructions which were not requested. *Bissett v. Ply-gem*, 533 F. 2d 142 (5th Cir., 1976).

Reference must be had to state law to determine if waiver or failure to preserve exists. *U.S. ex rel. Maxey v. Norris*, 591 F. 2d 386, cert. denied, 444 U.S. 912 (1978). Under Vermont law, where constitutional issues are raised on appeal that are not raised below and there appears to be no glaring error, they are foreclosed from consideration. *State v. Prue*, 138 Vt. 331, 415 A. 2d 234 (1980);

*State v. Patnaude*, 140 Vt. 361, 430 A. 2d 402 (1981). The constitutional issue asserted here does not rise to the level of the "glaring error test" which forgives a party from its advocacy responsibility. *State v. Stockwell*, 142 Vt. 232, 453 A. 2d 1120 (1982); *State v. Towne*, 142 Vt. 241, 453 A. 2d 1133 (1982). The test is whether the trial court has been so alerted to the claimed defense that it had a fair opportunity to gauge its application and utilize it if appropriate. *Scanlin v. Hopkins*, 128 Vt. 626, 270 A. 2d 352 (1970); *Dodge v. McArthur*, 126 Vt. 81, 223 A. 2d 453 (1966).

Since D & B never requested instructions for compensatory and punitive damages based on *Gertz*, it is too late in the day to contend for such protection. This omission is particularly crucial on the punitive damage issue. Support for the proposition that the *Gertz* doctrines were not an independent defense asserted by D & B at trial is that it never offered the trial court any suggestion whatsoever as to how to formulate jury instructions based on both the *Gertz* standards and the common law privilege. This would have been, of course, a formidable task.

### **III. THE CLAIMS MADE BY DUN & BRADSTREET ARE INCONSISTENT WITH THE TRIAL COURT'S INSTRUCTIONS ON DAMAGES**

Implicit in D & B's arguments are the claims that liability for actual or compensatory damage was imposed without fault and that punitive damages were assessed solely and exclusively because of the publication of the defamatory report of Greenmoss' bankruptcy. Both of these assumptions are erroneous.

Any fair reading of the charge demonstrates that it clearly and specifically negated any opportunity of Greenmoss to receive damages out of any presumption under the defamation *per se* doctrines. The references to libel *per se* acknowledge that the jury had some liberty, however slight, to decide that D & B was not a commercial credit rating agency. D & B has never claimed the jury did not make such a conclusion nor could it. Ironically, the aspect of the charge that D & B seems to take the strongest exception to is taken verbatim from D & B's third Request to Charge the Jury.

Instructions must be interpreted and construed as a whole. *Curtis Publishing v. Butts*, 388 U.S. 130 (1967). Construing this charge as a whole and specifically considering the findings of the jury, liability was not assessed without fault and the trial court's commentary on the doctrines of libel *per se* had no operative effect.

To the extent that D & B contends it was assessed damages without proof of fault, the standards that Greenmoss had to prove to obtain a compensatory damage verdict were far more restrictive than that assumed to be required by *Gertz*.

On the issue of punitive damages, D & B makes the erroneous assumption that the jury's punitive damage award was issued because it published a defamatory statement. The trial Court's instructions were not so limited, nor was the evidence. The Vermont Supreme Court concluded that "there was ample evidence in the record to enable the jury to conclude that Defendant's conduct was insulting, reckless, and in total disregard of the Plaintiff's rights." (J.A. 45). The Court made no mention of

just the defamation and directed its attention to the cavalier attitude of D & B in its treatment of Greenmoss after the bankruptcy notice. (J.A. 34-36).

In short, D & B apparently would have this Court rule that once *Gertz* applies to a defamation case, other conduct of a defendant *totally apart from its publication* is immunized from traditional common law punitive damage considerations. Stated otherwise, D & B attempts to erect a shield against reckless, oppressive, harassing and outrageous acts merely because at some point in its relationship with Greenmoss, it engaged in publication. Such a contention is well beyond any theory recognized by this Court in First Amendment defamation litigation.

The trial Court's instructions were not limited to the publication of the false report of bankruptcy and this case does not simply involve the publication of a defamatory statement. It involves a defendant who, in addition to defaming, persistently and oppressively treated the Plaintiff well after the defamation. This conduct falls within the realm of traditional common law protection, not within the scope of the *New York Times/Gertz* philosophy.<sup>11</sup>

The Vermont Supreme Court concluded that the constitutional privilege outlined in *Gertz* was afforded to D & B. This ruling constitutes a legal interpretation by the state's highest court on the impact and legal effect of the instructions when taken as a whole. Therefore, the initial consideration in this case does not involve a

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<sup>11</sup>D & B does not contend that all punitive damage awards are constitutionally proscribed.

constitutional question but, rather, whether the Vermont Supreme Court correctly concluded as a matter of fact and state law that the trial Court's charge included the *Gertz* requirements. To reach the questions urged by D & B, this Court must first resolve against the Vermont Supreme Court and in favor of D & B, a factual question and a mixed question of fact and law as to the appropriateness of that Court's interpretation concerning a jury charge delivered by one of its trial courts. *Smith v. Wade*, — U.S. —, 103 S. Ct. 1625 (1983), elucidates the point that jury instructions need not be compartmentalized on the question of punitive damages when the same standard for awarding punitive damages is an operative component of or is encompassed in the standards necessary for obtaining compensatory damages.

In this case, since negligence abundantly exists and is admitted by D & B, "fault", required by *Gertz* as a precondition to the recovery of actual damages, is present. The high standard Greenmoss had to meet merely to obtain compensatory damages incorporates and encompasses the *Gertz* standard mandated for punitive damages. D & B fails to demonstrate how the application of *Gertz* to this case would benefit it. Accordingly, the result of the Vermont Supreme Court should be affirmed irrespective of this Court's decision on the extension of *Gertz*.

### CONCLUSION

Based upon the foregoing, Respondent, Greenmoss Builders, Inc., respectfully urges the Court to affirm the judgment of the Vermont Supreme Court.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

DUN & BRADSTREET, INC.,

*Petitioner.*

v.

GREENMOSS BUILDERS, INC.

*Respondent.*

On Writ Of Certiorari To The  
Supreme Court Of The State Of Vermont

MOTION FOR LEAVE TO FILE  
SUPPLEMENTAL BRIEF AND  
SUPPLEMENTAL BRIEF  
OF RESPONDENT, GREENMOSS BUILDERS,  
INC.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1983

—  
No. 83-18  
—

DUN & BRADSTREET, INC.,

*Petitioner,*

v.

GREENMOSS BUILDERS, INC.,

*Respondent.*

—  
**On Writ Of Certiorari To The  
Supreme Court Of The State Of Vermont**

—  
**MOTION FOR LEAVE TO FILE  
SUPPLEMENTAL BRIEF AND  
SUPPLEMENTAL BRIEF OF  
RESPONDENT, GREENMOSS BUILDERS, INC.**

Respondent, Greenmoss Builders, Inc, hereby moves for leave to submit a Supplemental Brief consisting of four pages addressing two issues in the case and in support thereof represents as follows:

1. In drafting its initial brief, Greenmoss was guided by advice, assistance and instructions from its printer that a page of typewritten material would be approximately equivalent to a page of offset printing.
2. In attempting to abide by the Court's 50-page limitation for briefs set forth in Rule 34.3, Greenmoss

excised from the draft of its initial brief the facts and authorities contained in this Supplemental Brief due to space restraints.

3. Greenmoss' initial Brief submitted to the Court comprises forty-three pages in length.

4. The four additional pages of brief set forth in this Supplemental Brief will assist the Court in the factual exposition of the case and explains the calculation and computation of the jury's verdict on compensatory damages. Additionally, the Supplemental Brief provides additional support, drawn from cases already cited in Greenmoss' Brief, for the position that credit reporting agencies have no fear of self-censorship if the constitutional protections outlined in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) are not extended to them.

5. Dun & Bradstreet has filed no reply brief. Further, the within brief is submitted sufficiently in advance of argument so as to avoid prejudice to D & B.

6. The additional material in the Supplemental Brief will increase Greenmoss' Brief to 46 pages. Greenmoss would have incorporated the arguments made in the Supplemental Brief in its initial Brief but for the general guidelines provided by its printer as to the correlation between the typewritten page and the conversion to offset printing.

7. On March 1, 1984, Greenmoss forwarded to Dun & Bradstreet typewritten copies of the within Motion and Supplemental Brief in order to provide D & B with additional advance time to review the points addressed herein.

WHEREFORE, Greenmoss moves that the within Motion be granted and that the Supplemental Brief be accepted and considered by the Court in addition to Greenmoss' initial Brief.

Respectfully submitted,

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## SUPPLEMENTAL STATEMENT OF THE CASE

### 1. The Facts.

D & B's suggestion that the \$50,000 compensatory damage award derives from the notion of presumed damages is belied by the evidence on damages and the trial Court's charge on compensatory damages.

The charge on compensatory damages instructed the jury to consider items of lost profit and Greenmoss' expenditures caused by D & B's wrongdoing (J. A. 19). D & B claims that such items only total \$36,000 instead of the \$50,000 awarded by the jury. This claim fails to consider that the charge also provided the jury the right to award interest on the damages found from the time of injury, July 26, 1976, to the date of the verdict, April 10, 1980. (Tr. 491). Interest could be awarded at the Vermont statutory rates of 8½ percent per annum until July 1, 1979 and then at 12 percent per annum from July 1, 1979 to the date of verdict. (Tr. 491). Even under D & B's calculation of the actual damages at \$36,000, consideration and calculation of interest, when added to the damage figure asserted by D & B yields a total compensatory damage figure, as of the date of the verdict, of approximately \$50,022.30. This is virtually the amount awarded by the jury for compensatory damages.

Secondly, D & B's analysis of the components of the compensatory award is limited to consideration of lost profits for only a one-year period. Greenmoss introduced evidence that the lost profits in the succeeding year was an additional \$42,000. (Tr. 99, 104).

Thirdly, the compensatory damage instructions cautioned the jury that a verdict of substantial damages was not compelled unless Greenmoss proved "that substantial damages have in fact occurred." (J.A. 19 empha-

sis added). The next sentence of the charge re-emphasized that compensation to Greenmoss must be related to the damages *actually* caused by D & B. (J.A. 19 emphasis added).

Finally, the trial court expressly limited consideration of compensatory damages to only lost profits and such expenditures as were made by Greenmoss for self help corrections of the falsehood. (Tr. 488). Accordingly, more abstract actual damage elements such as humiliation and impairment of standing in the community comprise no part of the jury's compensatory damage award here. Cf. *Gertz supra*, at 350. In this case, any presumed compensatory damages were limited to a nominal amount "such as one dollar". (Tr. 488). D & B does not claim the \$50,000 compensatory damage award is nominal.

### ARGUMENT

To supplement the arguments made in Section I-B of its initial Brief at pages 30 and 31, Greenmoss submits the following.

*Hood v. Dun & Bradstreet, Inc.*, 482 F. 2d. 25 (5th Cir. 1973) cert. denied, 415 U.S. 95 (1974) holds that commercial credit reporting agencies should not be afforded First Amendment protection in defamation cases. In addition to relying upon the commercial speech doctrine, the court in *Hood* doubted that such companies would be inhibited by self-censorship if First Amendment protections were withheld. Because the common law privilege extended to credit reporting agencies is predicated upon the theory that, absent such privilege, such companies would be driven out of business by the cost of defamation suits, the court analyzed the status of credit reporting agencies in jurisdictions that have declined to apply the common law protection.

In Georgia, where credit reporting agencies have no common law privilege, such businesses exist and are thriving. Indeed, the *Hood* court noted that D & B does business in Georgia despite the lack of the privilege and one of the largest credit reporting agencies in the country, Retail Credit Company, is based in Georgia.

The court also referred to a study comparing the activities of credit reporting agencies in Idaho, where no common law privilege exists, with credit agencies in the state of Washington, where the privilege does exist. 482 F. 2d. at 32, n. 18.

The conclusions in that study that no real difference in credit agencies' activities could be perceived in the two states and other factors led the *Hood* court to the conclusion that in those states where there is no conditional privilege, credit information is readily available and there is apparently no inhibition from publishing such reports due to lack of the protection of the privilege.

In short, fears of self-censorship should not be a reason for extending *Gertz* to such defendants especially where there is no evidence whatsoever on this record to suggest

that these unique entities will refrain from publishing their reports about private persons who are not public officials or public figures out of fear of defamation suits. cf. *Gertz, supra.* at 390; (White, J., Dissenting).

Respectfully submitted,

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⑧  
No. 83-18

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IN THE

**SUPREME COURT OF THE UNITED STATES**  
**OCTOBER TERM, 1983**

**DUN & BRADSTREET, INC.,**  
*Petitioner,*

v.

**GREENMOSS BUILDERS, INC.,**  
*Respondent.*

On Writ of Certiorari to the  
Supreme Court of the State of Vermont

**REPLY BRIEF OF PETITIONER**

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## ARGUMENT

The issue before the Court is whether the First Amendment limits awards of presumed and punitive damages against "non-media" defendants in actions for defamation. D&B has urged the Court to confirm that the First Amendment protects all speakers against awards of presumed and punitive damages, absent proof of actual malice. By doing so, the Court would hardly sound the "death knell of reputational interests of our citizenry." (Respondent's Brief at 12) The limited holding sought here would not do away with the law of libel, nor would it prevent private defamation plaintiffs from recovering damages for actual injury. Despite Greenmoss' obfuscation, D&B seeks only the same result required in defamation cases brought against newspaper publishers, magazine distributors, and television broadcasters.

What D&B urges is not a sweeping change in First Amendment doctrine. A ruling in favor of D&B would, instead, flow naturally from the Court's holding in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), where the Court recognized that absent proof of knowing falsity or reckless disregard for the truth, the states' interest in awarding damages for defamation extends no farther than compensation for actual injury.

Unable to explain why the states' interest is somehow more extensive here than it was in *Gertz*, Greenmoss has tried to obscure the issue by suggesting an expanded view of "commercial speech" and by otherwise contending that the First Amendment does not apply to reports of bankruptcy and other financial matters. In the process, Greenmoss makes little mention of its \$350,000 verdict, no doubt recognizing that

a verdict of that size is insupportable under the circumstances of this case.

As demonstrated below, Greenmoss' arguments against First Amendment limitations on presumed and punitive damages are unacceptable. Rather than importing the unsettled doctrine of "commercial speech" into the law of defamation, and rather than making a constitutional distinction between the press and other members of the public, the Court should confirm that the Constitution's limitations on presumed and punitive damages apply in the same fashion to all speakers. The judgment of the Vermont Supreme Court should therefore be reversed.

## I.

### **NO STATE INTEREST JUSTIFIES THE AWARD OF PRESUMED AND PUNITIVE DAMAGES AGAINST A "NON-MEDIA" DEFENDANT ABSENT ACTUAL MALICE.**

#### **A. The Award of Presumed Damages in This Case Has Not Been Justified and Cannot Be Supported.**

In this case, Greenmoss sued D&B for \$7,500 actual damages and \$15,000 punitive damages following a false report of bankruptcy.<sup>1</sup> (J.A. 5-7) After a two-day trial, the jury returned a \$350,000 verdict for Greenmoss, many times the company's net worth. That

<sup>1</sup> Following the report of bankruptcy, D&B promptly issued a retraction in the form of a "Correction Notice" (J.A. 15) explaining the error and advising that the bankruptcy petition had been filed by an employee of Greenmoss, and not Greenmoss itself.

award resulted from instructions that gave the jury uncontrolled discretion to assess unlimited amounts of damages without regard to actual injury, without regard to D&B's perception of the truth at the time of its report, and without regard to the fact that D&B had issued a prompt retraction.

Given these facts, Greenmoss makes no mention of presumed damages in its brief, preferring instead to speak vaguely of "the damage issue" and "compensatory damages." (Respondent's Brief at 6) Faced with the Court's holding in *Gertz* that the states have no substantial interest in authorizing presumed damages for defamation in the absence of actual malice, Greenmoss does not even try to make a case for presumed damages. Nor does Greenmoss suggest that there is anything unique about itself that makes presumed damages constitutionally permissible here when the First Amendment requires proof of actual malice elsewhere.<sup>2</sup>

On the other hand, Sunward Corporation ("Sunward"), which has filed an *amicus curiae* brief in support of Greenmoss and which has its own exorbitant presumed damages verdict to protect, extols the virtues of presumed damages as a means of "achieving" the states' interest in protecting private reputation.<sup>3</sup>

<sup>2</sup> Greenmoss cites the states' general interest in protecting private reputations with no attempt to relate that to the presumed damages component of its verdict. That, of course, is the very interest *Gertz* rejected as a basis for awards of presumed damages.

<sup>3</sup> The \$3,847,488 verdict for the plaintiff in *Sunward Corp. v. Dun & Bradstreet, Inc.*, No. 82-K-147 (D. Colo. filed January 27, 1982) is a good example of the kind of unmerited windfall—of staggering proportions—that can result from allowing a defamation case to go to a jury without an instruction that presumed

Yet Sunward wholly fails to explain why the states' interest in compensating plaintiffs should be greater in a case of defamation than in a case of negligent misrep-

damages may be awarded only upon a finding of knowing falsity or reckless disregard for the truth (with "reckless disregard" defined as "serious doubt as to the truth" as per *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)).

Sunward's libel claim was based on a D&B report that underestimated Sunward's annual sales and the number of its employees by a substantial percentage. Sunward made no effort to prove any causal connection between the D&B report and a subsequent decline in sales, which the evidence, apparently disregarded by the jury, showed was caused by mismanagement and a decline in the agricultural economy which Sunward served. Instead, Sunward put on the stand its own personnel who testified about rumors of unknown origin that Sunward was in financial difficulty. Sunward's counsel attributed the sales decline to those rumors.

Sunward had available to it through discovery the names of over one hundred recipients of the allegedly defamatory report. (Plaintiffs' trial exhibits 46, 47, 48, 49A and 49B) Sunward's own records contained the names of its 240 salesmen, 1300 dealers, 26 bankers, nearly 100 suppliers and numerous customers—the persons whom, it was argued, might have acted adversely to Sunward as a result of the report or the rumors. Nevertheless, Sunward called not one report recipient, not one salesman, not one dealer, not one banker, not one supplier, and not one customer to testify that the report or any rumor adversely affected their relationship with Sunward.

Instead, Sunward merely introduced evidence of its decline in sales and, like Greenmoss, "projections" of profits it thought it should have made, and relied completely on the doctrine of presumed damages to support its damage claim. The quality of the testimony of the Sunward officers and employees who testified about the rumors and denied that the sales decline had anything to do with the decline in the agricultural market was such that the trial judge, at the hearing on the post-trial motions, commented on the record that had the case been tried to the Court, he would have found for the defendant "because of issues of credibility in the case. . . ." (*Sunward Post Trial Motions, Transcript at 46-47*)

resentation, interference with contract, or fraud, which may involve far more substantial injuries than the damage suggested here. The conduct involved in fraud is far more reprehensible than negligent defamation. Yet Vermont limits recovery for fraud to injury in fact and further requires competent proof of damages.<sup>4</sup> It seems unlikely that Vermont would have any significant interest in permitting presumed damages for negligent defamation, where the defendant's conduct is less culpable.

Sunward contends that presumed damages are needed in defamation cases because defamation plaintiffs may find it difficult to show that a defamatory statement caused a particular loss. Presumed damages are said to be defamation's counterpart to the negligence doctrine of *res ipsa loquitur*. That analogy, however, does not fit. *Res ipsa loquitur* concerns fault, not damage. A negligence plaintiff who relied on the doctrine of *res ipsa loquitur* would still have to prove injury in fact, a requirement that neither Sunward nor Greenmoss have had to meet.

The problem for Sunward and Greenmoss is *not* that actual damage is difficult to trace to D&B; it is that actual damage simply does not exist. There are

<sup>4</sup> A Vermont plaintiff who seeks compensation for fraud is only "entitled to 'recover such damages. . . as will compensate him for loss or injury actually sustained and place him in the same position that he would have occupied had he not been defrauded.'" *Conover v. Baker*, 134 Vt. 466, 365 A.2d 264, 268 (1976) (emphasis added). In such a case the burden is on the plaintiff "to show, not only that [he has] been damaged by the fraud of the defendant, but also to show facts necessary for the proper and correct computation of damages." *Larochelle v. Komery*, 128 Vt. 262, 261 A.2d 29, 33 (1969).

certainly no causation problems in the case before the Court. The false report at issue was sent to a small, readily identifiable audience. The five recipients of D&B's Special Notice were all presumably available to testify, but none of them were called by Greenmoss. Had the Special Notice caused actual injury, Greenmoss could have shown this by calling one or more of the five recipients.<sup>5</sup>

Sunward's suggestion that presumed damages somehow aid a prospective plaintiff to discover a defamatory publication is particularly inapt. As Greenmoss concedes, it learned of the false report of bankruptcy within days after the Special Notice was first issued. More important, the possibility that a plaintiff may never discover its cause of action is irrelevant to the issue here: namely, the rules of damage to be applied consistently with the First Amendment once an action has been filed.

Whether or not presumed damages effectuate a state's interest in compensating injury to reputation, that interest is no broader here than it was in *Gertz*. Every argument made in support of presumed damages was before the Court in *Gertz*, and all of them were rejected there. See 418 U.S. at 376 (White, J., dissenting opinion). While presumed damages may

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<sup>5</sup> It is naive of Sunward to suggest that a plaintiff could never learn the extent to which a D&B report had been distributed. As its district manager testified at trial, D&B records the name of each subscriber who receives a particular report. (Tr. 365) A single interrogatory would elicit this information, and that is precisely what happened in this case. See D&B's Answer to Interrogatory No. 11 contained in document entitled "Plaintiffs' Interrogatories to the Defendant and Request to Produce" at 5. The same fact pattern existed in *Sunward*. See Footnote 3, *supra*.

make it easier for plaintiffs to recover damages for defamation, that comes at the cost of overcompensating many, like Greenmoss and Sunward, who have not been injured at all or who have suffered only minor injury at worst. Common law rules presuming injury in fact from proof of a defamatory publication—and permitting uncontrolled arbitrary jury awards of general damages for that presumed injury—impermissibly conflict with the First Amendment. No legitimate state interest justifies this result. *Gertz*, 418 U.S. at 350.

#### B. The Award of Punitive Damages is Equally Insupportable.

Unable to explain why punitive damages should be any more available against publishers like D&B than against members of the established communications "media," Greenmoss tries to justify its \$300,000 punitive damage verdict by pretending that its punitive damages had nothing to do with defamation. Greenmoss posits a state interest in "deterring repeated, harrassing and persistent conduct taken against [its] citizens." (Respondent's Brief at 21) But Greenmoss made no separate claim for repeated, harrassing and persistent conduct in the proceedings below. Its complaint alleged a single cause of action for libel based solely upon the publication of D&B's Special Notice.

Greenmoss' argument that its punitive damages are supportable without regard to its defamation claim is based upon a misreading of the trial court's charge on punitive damages. The trial court permitted the jury to assess D&B's conduct before and after the publication, but *only* in considering whether Defendant acted with actual malice in the first instance. (J.A. 20) The

trial court instructed the jury to award punitive damages only if it found actual malice *in D&B's publication*:

If you find that Defendant's conduct was not privileged, and if you also find, on the basis of clear and convincing evidence, *that the Defendant acted with actual malice in publishing the article in question*, then you may award Plaintiff punitive or exemplary damages in addition to the actual damages assessed.

(J.A. 20) (emphasis added). In short, subsequent conduct was to be considered only insofar as it reflected defendant's state of mind when the erroneous report was published. The charge cannot be read as permitting punitive damages without regard to the publication or based on conduct quite apart from the act of publishing the report.\*

Greenmoss is equally misguided when it argues that the trial court's instructions on mitigation of damages somehow limited the jury's discretion more here than in *Gertz*. (Respondent's Brief at 21-22) To the contrary, the jury was given complete discretion to assess any amount it chose, however unreasonable. Far from illustrating how a trial court can curb a jury's passions with carefully framed instructions, this case presents a clear example of what troubled the Court in *Gertz*—"punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual

\* Although it utilized the undefined words "actual malice," the trial court failed to charge the actual malice standard of *New York Times, Co. v. Sullivan*, 376 U.S. 254 (1964). See Brief of Petitioner at 7.

harm caused"<sup>7</sup>—imposed in this case by a jury given free reign to punish an out-of-state corporation whose business the jury did not like.

Recognition that actual malice is a constitutional prerequisite to punitive damages in all defamation cases would prevent unjust, inconsistent verdicts. The different treatment given to the punitive damage issue in *Sunward* highlights the First Amendment problem in this area. As *Sunward* notes on page 13, n.14, of its brief, the trial judge in *Sunward* withdrew the punitive damage issue from the jury as a result of D&B's prompt notice to subscribers of an error in its reports about *Sunward*. D&B gave the same prompt notice here, but the trial judge did not feel similarly constrained. Instead, he gave the jury discretion to award punitive damages, placing no limits on that discretion apart from a vague, standardless charge on mitigation. (J.A. 20) An actual malice rule would have caused both cases to be treated alike and would have prevented the arbitrary, excessive verdicts reached.

## II.

### THE INFORMATION PUBLISHED BY D&B CONCERNING GREENMOSS IS NOT "COMMERCIAL SPEECH."

Avoiding the lack of any legitimate, identifiable state interest to support the award of presumed and punitive damages in this case, Greenmoss simply labels the Special Notice as "commercial speech" and concludes that D&B is unworthy of First Amendment

<sup>7</sup> 418 U.S. at 350.

protection. The "commercial speech" doctrine, however, has no application to the speech at issue.

Greenmoss admits that D&B's publication was not an advertisement and did not propose a commercial transaction. (Respondent's Brief at 15, 23-24) It also concedes that the publication did not consist of statements made in the economic interest of the speaker. (Respondent's Brief at 23-24) Nothing in the Special Notice promoted the speaker or the speaker's product. D&B's report concerns information about a third party, published to entities with whom D&B already had established a relationship. The hallmarks of "commercial speech" are therefore lacking here.

The "commercial speech" cases decided by the Court have concerned the validity of state regulation of advertising and closely related methods of commercial solicitation. Each recent case in which the Court has refined the contours of "commercial speech" has involved attempts to regulate or prohibit advertising or related commercial activity. None of them has dealt with defamation. Moreover, the factors used to distinguish "commercial speech" from other speech are unique to advertising or promotional activity. See, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (ban on advertising by pharmacists); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (restrictions on attorney advertising and solicitation); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978) (attorney advertising and solicitation); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977) (signs advertising sale of residential property); *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981) (billboard advertising); *Central Hudson Gas & Electric Corp. v. Public Service*

*Commission*, 447 U.S. 557 (1980) (advertising by a public utility); *Bolger v. Youngs Drug Products Corp.*, \_\_\_ U.S. \_\_\_, 103 S.Ct. 2875 (1983) (birth control advertisements).<sup>8</sup>

Despite the inapplicability of the "commercial speech" doctrine even under its most expansive interpretation, Greenmoss and Sunward make three arguments for treating the Special Notice as "commercial speech." The first, that the publication lacks constitutional merit merely because it deals with business matters, ignores this Court's decisions to the contrary. *E.g., Thornhill v. State of Alabama*, 310 U.S. 88, 102 (1940) ("Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."). The second argument is the equally simplistic claim that publications made for profit must be branded "commercial speech." That claim was discredited more than thirty years ago. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952) ("That books, newspapers, and magazines are

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<sup>8</sup> Greenmoss' discussion of the "hardiness" and "easily verifiable" nature of "commercial speech" has no application here. When the *Central Hudson* Court spoke of "commercial speech" as "hardy," it referred merely to the fact that the speaker has an interest in disseminating messages encouraging participation with him in commercial transactions which renders the speech "not particularly susceptible to being crushed by overbroad regulation." 447 U.S. at 564 n.6. It has also been said that "commercial speech" is easy to verify since it does not depend upon material gathered from outside sources or about other persons, but concerns the speaker's own product or service. Properly understood, these attributes of "commercial speech" thus have no application to the D&B publication at issue.

published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment."). Since then, the idea that profit motives are antithetical to the First Amendment has been rejected whenever it has reappeared. *E.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964); *Time, Inc. v. Hill*, 385 U.S. 374, 397 (1967); *Virginia State Board*, 425 U.S. at 761.

Greenmoss' final argument, that D&B's Special Notice is not of general concern or public interest, harkens back to *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), where a similar public interest notion was brought into the law of defamation. In *Gertz*, of course, that notion was abandoned because it was both overbroad and underinclusive. 418 U.S. at 346. *Rosenbloom*'s short-lived "public interest" test failed to produce an acceptable accommodation of constitutional concerns and the interests served by remedies for libel. There is no reason to believe that the *Rosenbloom* approach would have any better results if applied as a means of formulating a "commercial speech" exception to the First Amendment.

For the reasons expressed above, all of the "commercial speech" arguments in this case are fatally flawed.\* More important, none of the "commercial

\* It has been argued that a common law qualified privilege available to commercial credit reporting companies in many states would afford adequate protection to D&B. The underlying premise of that argument is that D&B's Special Notice constitutes "commercial speech" and may therefore be assigned a lesser level of protection. Because that premise is false, the argument need not be considered further. The Court should recognize, however, that the qualified privilege argument has no application here, since Vermont does not recognize the privilege. (J.A. 40)

speech" arguments addresses the fundamental issue before the Court. Why should the statement "Greenmoss is bankrupt" be subject to First Amendment limits on presumed and punitive damages when it appears on page 17 of *The Burlington Free Press*, but not when it appears in one of D&B's reports? As the following section shows, no persuasive reason has been offered for a rule that would create vast, speaker-based differences in exposure to damages arising from the same defamatory words.

### III.

#### THE FIRST AMENDMENT DRAWS NO DISTINCTION BETWEEN "MEDIA" AND "NON-MEDIA" DEFENDANTS.

In an effort to explain why "media" defendants should have greater First Amendment rights, Greenmoss argues that the First Amendment protects only speech relevant to "self-government" or to some other arbitrarily chosen set of values. The problems with that argument are set forth in the Brief of Petitioner at 23-27. Greenmoss' analysis also fails to recognize that the content of the message cannot be used to justify a constitutional distinction between "media" and "non-media" speakers. "Media" speech has no monop-

Furthermore, adopting state law rules of privilege as a means of effectuating the First Amendment would invert the Supremacy Clause, subjecting fundamental constitutional rights to the vagaries of state law. Since standards of conduct necessary to defeat the privilege range from simple negligence through gross negligence to spite, a holding that made state law determinative would lead to conflicting decisions.

oly on the values identified. (Brief of Petitioner at 26-27)

Moreover, the publication dismissed so easily by Greenmoss as a "credit report" plays a central role in the structuring of business relationships, which is what the free flow of business information is all about:

The language of the First Amendment does not except speech directed at private economic decisionmaking. Certainly such speech could not be regarded as less important than political expression. When immersed in a free flow of commercial information, private sector decisionmaking is at least as effective an institution as are our various governments in furthering the social interest in obtaining the best general allocation of resources.<sup>9</sup> Baumol, *Economic Theory and Operations Analysis*, 249-256 (1961); Braff, *Microeconomic Analysis*, 259-276 (1969); Dorfman, *Prices and Markets* 128-136 (3d ed. 1967).

The financial data circulated by Dun & Bradstreet, Inc., are part of the fabric of national commercial communication. There is no doubt that an adverse credit rating can injure a subject. But one injured can inform his suppliers and creditors that a report is misleading. Indeed, in this case, Dun & Bradstreet, Inc. was willing to print a retraction. It is difficult to credit a claim that the "general damages" suffered by the respondent resulted from the short-term confusion between the mis-publication and the retraction. In any event, . . . such speculative costs of unfettered communica-

tion are preferable to the chill upon free expression that the libel laws impose.

---

<sup>9</sup> Presumably the credit reports published by the petitioner facilitate through the price system the improvement of human welfare at least as much as did the underlying disagreement in our most recent libel opinion, *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811 (1971), arising out of a squabble over whether a vendor had sold obscene magazines.

*Dun & Bradstreet, Inc. v. Grove*, 404 U.S. 898, 905-06 (1971) (Douglas, J., dissenting from denial of certiorari).

Here, as in *Gertz*, the Court is not called upon to protect false speech itself but, rather, to tolerate a range of error so that truthful information will not lose its utility. D&B's subscribers depend upon its reports to make business decisions, which often must be made quickly. If a credit applicant suffers a downturn in business while its application for credit is pending, the creditor would want to know that fact immediately. But if D&B were subject to unlimited awards of presumed and punitive damages in the manner of the Greenmoss and Sunward verdicts, D&B would be reluctant to report the applicant's changed financial circumstances, at least until the information could be triple checked. As a result, even though the information might be dispatched to the creditor eventually, it might come too late for the information to be of any practical use.

Greenmoss argues that D&B is wrong in insisting that failure to reverse the lower court's decision would pave the way for *ad hoc*, inconsistent results. Accord-

ing to Greenmoss, it would be an easy matter for the Court to hold that D&B has lesser First Amendment rights than "media" defendants simply because of the medium involved, or, as Sunward puts it, "[a] credit report is a credit report." That argument begs the question. It fails to explain what there is about a credit report that makes it different from other forms of speech. At the same time, it ignores striking similarities between D&B reports and newspapers. Both report on court proceedings. To obtain information, D&B and the newspaper send reporters to the courthouse. Both the D&B reporter and the newspaper reporter summarize facts reflected by court records. Each reporter's information is then reviewed and edited. Both D&B and the newspaper want the information to reach their subscribers without delay, fearing that delay would deprive the information of its utility. Finally, readers of both the newspaper and D&B reports use the information to structure private economic relationships. Given these similarities, it would be anomalous to subject D&B to unlimited exposure to damages for libel while limiting the newspaper's exposure for the very same speech.<sup>11</sup>

Even so, Greenmoss insists that *Gertz* should not apply to "non-media" defendants "since in most non-media cases, particularly those which involve credit reporting agencies common law privileges are usually available." (Respondent's Brief at 31) That argument ignores the fact that no such privilege was available here. It also fails to consider that common law privi-

<sup>11</sup> Greenmoss' argument that "media"/"non-media" distinctions in presumed and punitive damage limitations are justified by the "of the press" clause in the First Amendment is invalid for reasons expressed at 16-20 of the original Brief of Petitioner.

leges are available to "media" and "non-media" defendants alike. It is a rare case in which a "media" defendant would have no common law privilege to assert against a claim of libel.

Next, Greenmoss argues that plaintiffs defamed by "media" defendants have a "right of reply," but that the "credit reporting medium" affords no opportunity to counteract false statements of fact. Greenmoss is wrong on both counts. First, D&B voluntarily printed a retraction of its false statements about Greenmoss within days after the Special Notice was issued, counteracting the false report. Second, an individual's "right of reply" to "media" defamation is entirely dependent upon the "media" party's willingness to publicize the individual's point of view. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). Few letters to the editor actually appear in print.

As a corollary to its right of reply argument, Greenmoss declares that where "non-media" defamation is concerned it would be difficult to discover and correct a false publication. As discussed above, that has nothing to do with the situation here: one who does not discover the source of a defamatory statement does not benefit from presumed and punitive damages because he is not in court. Despite what Greenmoss says, it is far more likely that one of the recipients of a "non-media" publication would alert the defamed party to what had been said. In "non-media" cases the defamed person or entity is also far more likely to be dealing with a small group of suppliers, customers or others who can be contacted easily for the purpose of correcting any false statement made.

In short, Greenmoss does not meet the problems with the "media"/"non-media" distinction, upon which the Vermont Supreme Court based its decision that First Amendment limitations on presumed and punitive damages do not apply to D&B. The distinction is analytically indefensible and unworkable in practice. The distinction cannot be justified, nor can its infirmities be eclipsed, by *ad hoc* and inaccurate characterization of the nature of the particular speech at issue here. To the contrary, the arguments contained in Greenmoss' brief furnish a perfect example of the morass of case-by-case adjudication which will ensue should this Court affirm the decision below.

#### IV.

**SINCE BOTH THE VERMONT TRIAL COURT AND THE VERMONT SUPREME COURT CONSIDERED AND DECIDED THE CONSTITUTIONAL ISSUES PRESENTED HERE, D&B'S CLAIMS ARE PROPERLY BEFORE THIS COURT.**

Even though Greenmoss never made the argument in the lower courts, it now contends that D&B failed to preserve its First Amendment claims. That contention has no merit. The Vermont trial court based its grant of a new trial on the First Amendment arguments made by D&B. The Vermont Supreme Court quite clearly heard and decided D&B's contention that the First Amendment precludes an award of presumed and punitive damages for libel absent proof of actual malice. (J.A. 36-40)

Under this Court's decisions, "There can be no question as to the proper presentation of a federal claim

when the highest state court passes on it." *Raley v. Ohio*, 360 U.S. 423, 436 (1959). "[I]t is irrelevant to inquire how and when a federal question was raised in a court below when it appears that such question was actually considered and decided." *Manhattan Life Insurance Co. of New York v. Cohen*, 234 U.S. 123, 134 (1914); *accord, Whitney v. California*, 274 U.S. 357, 360-61 (1927) (setting aside dismissal for want of jurisdiction where the record did not show defendant raised any federal question in state court, but where it appeared that state Court of Appeals had in fact considered and decided the question before the Court); *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974) ("[W]hether or not appellant argued this constitutional issue below, it is clear that the Supreme Court of Georgia reached and decided it. That is sufficient under our practice."); *Hess v. Indiana*, 414 U.S. 105, 106 n.2 (1973) ("Since the Supreme Court of Indiana considered and resolved each of Hess' constitutional contentions, it is apparent that it regarded Hess' actions in the state courts as sufficient under state law to preserve his constitutional arguments on appeal.").<sup>12</sup>

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<sup>12</sup> See also *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967):

Curtis' constitutional points were raised early enough so that this Court has had the benefit of some ventilation of them by the courts below. The resolution of the merits of Curtis' contentions by the District Court makes it evident that Butts was not prejudiced by the time at which Curtis raised its argument, for it cannot be asserted that an earlier interposition would have resulted in any different proceedings below. Finally the constitutional protection which Butts contends that Curtis has waived safeguards a freedom which is the "matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. State of Connecticut*, 302 U.S. 319, 327, 58 S.Ct. 149, 152, 82 L.Ed. 288. Where the ultimate effect of sustaining a

The cases cited by Greenmoss in support of its waiver argument do not hold to the contrary. That argument is, therefore, without merit.

## CONCLUSION

Based upon the foregoing, Petitioner Dun & Bradstreet, Inc. respectfully urges the Court to reverse the judgment of the Vermont Supreme Court and order a new trial.

Respectfully submitted,

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claim of waiver might be an imposition on that valued freedom, we are unwilling to find waiver in circumstances which fall short of being clear and compelling.

IN THE  
**SUPREME COURT OF THE UNITED STATES**  
**OCTOBER TERM, 1984**

**DUN & BRADSTREET, INC.,**  
*Petitioner,*

v.

**GREENMOSS BUILDERS, INC.,**  
*Respondent.*

On Writ of Certiorari to the  
**Supreme Court of the State of Vermont**

**SUPPLEMENTAL BRIEF OF PETITIONER  
ON REARGUMENT**

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## QUESTIONS PRESENTED FOR REVIEW

The issue presented in this case is whether the First Amendment's limitations on the award of presumed and punitive damages for libel, recognized in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), apply to "non-media" defendants. The questions presented for review are:

- I. Do the First and Fourteenth Amendments to the Constitution permit private plaintiffs to recover presumed "general" damages for libel against a "non-media" defendant absent a showing of "actual malice"?
- II. Do the First and Fourteenth Amendments to the Constitution permit private plaintiffs to recover punitive damages for libel against "non-media" defendants under a standard of liability less demanding than the "actual malice" standard of *New York Times v. Sullivan*?
- III. Did the trial court's instructions on presumed and punitive damages in this libel action violate the First and Fourteenth Amendments?

In addition to the questions presented above, the Court by order dated July 5, 1984, requested the parties to brief and argue the following questions:

- IV. Whether, in a defamation action, the constitutional rule of *New York Times* and *Gertz* with respect to presumed and punitive damages should apply where the suit is against a non-media defendant?

V. Whether, in a defamation action, the constitutional rule of *New York Times* and *Gertz* with respect to presumed and punitive damages should apply where the speech is of a commercial or economic nature?

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## STATEMENT OF THE CASE

### 1. The Facts

This is a libel action brought by Greenmoss Builders, Inc. ("Greenmoss") against Dun & Bradstreet, Inc. ("D&B"), Petitioner herein.<sup>1</sup> In late July, 1976, D&B issued a Special Notice to five D&B subscribers. That Special Notice mistakenly reported that Greenmoss had filed a voluntary petition in bankruptcy in the United States District Court for the District of Vermont.<sup>2</sup>

D&B issued the Special Notice based upon information received by the bankruptcy reporter for D&B in Vermont. Evidently the reporter misread a bankruptcy petition filed by a Greenmoss employee. There is nothing in the record to suggest that the reporter's apparent misreading of the bankruptcy petition was anything but an innocent mistake. Nor is there any evidence that she or D&B knew that the Special Notice was false when published or entertained any doubt as to its accuracy at the time.

---

<sup>1</sup> D&B publishes financial and other information concerning businesses. It is not a consumer reporting agency. It does not issue reports on private individuals.

<sup>2</sup> If a subscriber has received information on a particular business within twelve months of the issuance of a Special Notice, that subscriber will automatically receive the Special Notice. The Special Notice here was sent to the Howard Bank, American Express Company, State Mutual Insurance Company, Goodyear Tire & Rubber Company, and Aetna Insurance Company. See D&B's Answer to Interrogatory No. 11 contained in document entitled "Plaintiff's Interrogatories to the Defendant and Request to Produce" at 5. None of those firms was a customer of Greenmoss. With the exception of the Howard Bank, the record does not explain the nature or extent of Greenmoss' dealings with any of those firms. Regarding the Howard Bank see *infra* p. 3.

Within days of its issuance, D&B learned that the Special Notice was false. D&B promptly sent a retraction in the form of a "Correction Notice" to each of the subscribers who had received the erroneous report. (J.A. 15) The correction admitted the mistake and advised that an employee, not Greenmoss, had filed the bankruptcy petition. Nevertheless, Greenmoss sued for libel. Ultimately, Greenmoss won a \$350,000 verdict, even though its complaint had sought no more than \$7,500 "compensatory damages" and \$15,000 "punitive damages." (J.A. 5-7)

## 2. The Proceedings Below

The case was tried before a jury in Greenmoss' home county in Vermont. At the trial, Greenmoss made no attempt to show that the Special Notice had caused any of its customers, suppliers, or creditors to believe that Greenmoss was in fact bankrupt. The company did not call any of the five recipients of the Special Notice to testify to its effect. Greenmoss' sole evidence on injury and damages was the testimony of its former president, John Flanagan, who had a pecuniary interest in the outcome of the case.

Using speculative sales projections, Mr. Flanagan testified that Greenmoss' profits had fallen short of projected earnings. He conceded, however, that the company's most profitable year was the year that followed the Special Notice. (Tr. 143)<sup>3</sup> Moreover, there was no evidence establishing a causal connection between the publication of the Special Notice and Greenmoss' alleged lost profits.

<sup>3</sup> "Tr." signifies citations to pages of the separately-numbered trial transcript included in the Record.

Greenmoss contended that the Special Notice had prompted a bank to deny a loan to the company. But a representative of the bank, called by D&B, testified that when he received the Special Notice he did not believe it and confirmed that day with Mr. Flanagan that Greenmoss was still "alive and kicking and [wasn't] bankrupt." (Tr. 212-13) He testified that two senior officers from the bank's home office declined to make the loan for reasons wholly unrelated to the Special Notice.<sup>4</sup>

The trial court instructed the jury that no proof of injury was needed. It charged that this was an action for libel *per se* and that damages, therefore, were presumed:

[T]he Plaintiff does not need to prove actual damages resulting from the libel since damage and loss is *conclusively presumed*. . . .

. . . .

. . . [W]here, as in this case there is a libel *per se*, damages are presumed and actual damages may not be proven, you must determine the amount of compensatory damages to be awarded. In determining the amount of compensatory damages to award, you may consider such items as loss of profits and expenditures proximately caused by any wrong doing on the part of the Defendant. Although the law presumes damages in some amount in a case of libel *per se* and therefore relieves the Plaintiff of the burden of establishing by specific proof

<sup>4</sup> For further detail, see Brief of Petitioner at 3-5; see in particular, Brief of Petitioner at 5 n.6 (reasons loan refused).

that damages have occurred, the law does not compel you to return a verdict of substantial damages unless you are persuaded by a preponderance of the evidence that substantial damages have in fact occurred. It is proper, if, in your judgment you deem it to be correct, even in a case of libel per se, for you to return a verdict of nominal damages such as One Dollar, or damages in such other amount as you feel is fair and just compensation to the Plaintiff for the damages actually caused by the Defendant.

(J.A. 17, 19) (emphasis added).

Those instructions precluded a finding that Greenmoss had not been harmed. Greenmoss was relieved of the necessity of proving either the fact or the extent of its actual injuries, if any. While the charge left open the possibility that an insubstantial verdict might be returned, the instructions gave the jury full and complete discretion to award substantial damages in whatever amount it chose.

The trial court also instructed the jury that it could award punitive damages upon a finding that D&B acted with "actual malice." But the trial court did not instruct the jury that punitive damages could be awarded only upon a finding that D&B had published the Special Notice with knowledge of falsity or reckless disregard for the truth. The phrase "actual malice" was never defined. The trial court simply defined "malice" as follows:

If you find that the Defendant acted in bad faith towards the Plaintiff in publishing the Erroneous Report, or that Defendant intended to injure the Plaintiff in its business, or that it acted in a willful, wanton or reckless disregard of

the rights and interest of the Plaintiff, the Defendant has acted maliciously.

(J.A. 18-19) (emphasis added).

After hearing the trial court's charge, the jury returned a verdict for Greenmoss in the amount of \$350,000.00, including \$300,000.00 specifically designated as punitive damages. (J.A. 2) It is entirely consistent with both the verdict and the charge to regard the \$50,000 component of the verdict as nothing more than the jury's discretionary assessment of Greenmoss' *presumed* injury. The total was more than fifteen times the sum demanded in the complaint.

D&B filed a motion for a new trial, asserting that the trial court's instructions authorized presumed and punitive damages based on less demanding proof than the "actual malice" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). (J.A. 2) The trial court granted the motion, finding that *Gertz* applied to D&B and that the trial court's charge "may have misled the jury to believe that damages were presumed in some amount in the case." (J.A. 26) It also found "that the charge permitted the jury to believe that damages could be awarded to the Plaintiff for defamation absent proof of damages and absent a showing of knowledge of falsity or reckless disregard for the truth by the Defendant." *Id.*

After other post-trial proceedings, the trial court granted Greenmoss' motion for an interlocutory appeal to the Vermont Supreme Court and certified several questions concerning its order granting a new trial. (J.A. 29-30) The issue underlying the certified ques-

tions was the applicability of *Gertz* to "non-media" defendants.

On appeal, the Vermont Supreme Court did not question the trial court's conclusion that the jury instructions were misleading under the standards of *Gertz*. Rather, the Vermont Supreme Court held that the constitutional limitations on presumed and punitive damages derived in *Gertz* from the First and Fourteenth Amendments were inapplicable. The Vermont Supreme Court characterized D&B as a "non-media defendant" and held

that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions.

....

.... "When the defamation action is actionable per se the plaintiff can recover general damages without proof of loss or injury, which is conclusively presumed to result from the defamation, . . . ."

*Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 143 Vt. 66, 75-76, 461 A.2d 414, 418-19 (1983) (J.A. 40, 42) (emphasis added) (citations omitted). As a result, the Vermont Supreme Court held that the trial court had erred in granting a new trial and should have entered judgment on the verdict.

#### SUMMARY OF ARGUMENT

The common law rule of presumed general damages for defamation is an historical anomaly which does not permit sufficient breathing space for the exercise of First Amendment rights. State rules regarding punitive damages present an equal danger. Both permit

awards far in excess of injury and promote no legitimate state interest where the publication was made without "actual malice." For that reason, this Court held in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), that "the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury." *Id.* at 349.

Courts that have read *Gertz* as applying only to the "media" have ignored its rationale. The rule of *New York Times* and *Gertz* strikes a just accommodation between the States' interest in redressing injury for defamation and countervailing interests in freedom of speech and of the press. In this case and others like it, the States have no more substantial interest in securing for plaintiffs "gratuitous awards of money damages far in excess of any actual injury" than in cases involving "media" speech.

The Constitution should protect all defamation defendants to the same extent against the dangers of unbridled jury discretion. The First Amendment does not give any group more freedom of speech or of the press than others. According the "media" a special constitutional status would tend to undermine, rather than support, the First Amendment.

If the "media"/"non-media" distinction were upheld, efforts to divide defendants into "media" and "non-media" classes would lead to *ad hoc*, inconsistent results. In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), a plurality of the Court analyzed First Amendment constraints on the law of defamation in terms of "general or public concern." *Gertz* rejected that approach because of its unpredictability and be-

cause it inadequately served both of the competing interests at stake. The lower court's "media"/"non-media" distinction is subject to the same criticisms.

The constitutional rule of *New York Times* and *Gertz* was designed to be content-neutral. If the Court were to make an exception for "speech of a commercial or economic nature," that would conflict with the Court's long-established principle that the First Amendment bars government from restricting speech because of its message, ideas, subject matter, or content.

Whatever its parameters, "speech of a commercial or economic nature" is worthy of First Amendment protection. The need to ensure the free flow of information in our society extends to speech of that sort. A rule subjecting speakers to unlimited discretionary damages for defamatory "commercial or economic" statements, while limiting the liability of speakers who publish other defamatory words, would serve no legitimate state interest.

This Court's decisions have often recognized that speech on business, financial, and economic matters is encompassed by the First Amendment. Only in the narrow category of "commercial speech" has the Court permitted anything less than full First Amendment safeguards. Reports of the sort at issue here, though, are not "commercial speech." Commercial speech involves advertising and promotional speech. In contrast, financial reports do not solicit business or propose commercial transactions.

Just as First Amendment protection against presumed and punitive damages should not depend upon the speaker, neither should it depend upon the subject

matter of the speech. Uncertainty and unpredictability would result no less from efforts to define "speech of an economic or commercial nature" than from efforts to fashion a reliable definition of "the media."

If financial reports were unprotected by the First Amendment because of their content, every business information service and every trade and business journal would face unlimited exposure for defamation even for the most innocent mistakes. Different constitutional rules would be applied to different articles in every daily newspaper.

The Petitioner is not seeking to immunize itself against recovery for libel. What it seeks is nothing more than the protection *Gertz* held essential in the case of a limited circulation magazine: namely, protection against discretionary awards of presumed and punitive damages where calculated or reckless falsehood cannot be shown. Plaintiffs would remain free to make full recovery for any injury actually suffered. All that would be barred is a result the States have no legitimate interest in permitting: a windfall verdict against a defendant who simply makes a mistake and causes no actual harm.

## ARGUMENT

### I.

#### **GERTZ STRUCK THE PROPER BALANCE BETWEEN THE INTERESTS OF FREE SPEECH AND THE LEGITIMATE STATE INTEREST IN COMPENSATING DEFAMATION PLAINTIFFS FOR ACTUAL INJURY.**

At common law a person defamed by a statement that he was bankrupt could claim the benefit of two draconian rules. First, he could recover without regard to fault. That the defendant had acted with the best intentions and had taken all reasonable precautions against error might be considered in mitigation, but offered no defense to liability. W. Prosser, *Handbook on the Law of Torts* 799-800 (4th ed. 1971); C. McCormick, *Handbook on the Law of Damages* 437-38 (1935).

The second rule was just as harsh: injury was *conclusively presumed* from the defamatory nature of the statement.<sup>6</sup> "The presumption applied even if could be proven that the defamatory words were followed by

<sup>6</sup> For discussion of the impact of this presumption in defamation actions, see generally *Gertz, v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974); Prosser, *supra* p. 10, at 754; McCormick, *supra* p. 10, at 423. This Court has struck down similar conclusive presumptions on the ground that by precluding the defendant from presenting a defense to the main fact thus presumed, the presumption denied due process of law. See, e.g., *Heiner v. Donnan*, 285 U.S. 312, 329 (1932); *Mobile, Jackson & Kansas City Railroad Co. v. Turnipseed*, 219 U.S. 35 (1910); *accord Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 19 (1931); *cf. Vlandis v. Kline*, 412 U.S. 441 (1973) and cases cited therein (state's pre-

a pecuniary benefit." Veeder, *The History and Theory of the Law of Defamation II*, 4 Colum. L. Rev. 33, 50 (1904). (emphasis added) [hereinafter cited as Veeder II].

The plaintiff could rest his case after proving that the defamatory falsehood had been published. Unless the defendant could prove that his words were either true or privileged, the plaintiff's recovery was all but automatic.<sup>7</sup> R. Sack, *Libel, Slander and Related Problems* 346-47 (1980); Arkin & Granquist, *The Presumption of General Damages in the Law of Constitutional Libel*, 68 Colum. L. Rev. 1482, 1483 (1968). See *New York Times Co. v. Sullivan*, 376 U.S. 254, 267 (1964); Murnaghan, *From Figment To Fiction To Philosophy—The Requirements of Proof of Damages in Libel Actions*, 22 Cath. U. L. Rev. 1, 13 (1972). The amount to be awarded as presumed damages was left entirely to the "enlightened conscience of the jury."<sup>7</sup> To make matters worse for the defendant, in most ju-

sumption of continued domicile in calculating tuition payments deprived resident student of due process).

<sup>7</sup> Here, given the Vermont Supreme Court's rejection of a qualified privilege for commercial credit reports (J.A. 41), and given the admitted falsity of the Special Notice, the Petitioner is left with no defense at all.

<sup>7</sup> See *Gertz*, 418 U.S. at 349; Sack, *supra* p. 11, at 355; M. Newell, *The Law of Slander and Libel* 1025 (3d ed. 1914); McCormick, *supra* p. 10, at 423. Not surprisingly, drastically different verdicts have often resulted from similar defamatory statements. See McCormick, *supra* p. 10, at 443-47 for collection of representative verdicts. For more recent information, see Sack, *supra* p. 11, at 365-69. According to Professor McCormick, "Apart from the occasional traceable money loss recovered as special damage, damages in defamation cases are measureable by no standard which different men can use with like results." McCormick, *supra* p. 10, at 443.

risdictions the presumption of general damages was held to satisfy the actual injury prerequisite for recovery of punitive damages. J. Ghiardi & J. Kircher, *Punitive Damages Law and Practice* 13-53, 13-54 (1983).

Armed with the presumption of injury and causation, a typical business plaintiff will attempt to quantify its damages by presenting grossly inflated projections of sales and profits and comparing them with actual results.\* By cross-examination the defendant may expose questionable assumptions underlying the plaintiff's projections, but that also serves to emphasize the figure the plaintiff has proposed. In final argument plaintiff's counsel can be expected to remind the jury that damages are conclusively presumed and then suggest that the speculative projections should be used to define the plaintiff's damages. Even if a jury cuts the plaintiff's projections in half, the verdict will still far exceed any actual injury.

The rules of strict liability and conclusively presumed injury for defamation are historical anomalies with no sound justification to support them.\* Neither

\* Unlike the plaintiff in an action for negligence or breach of contract, the defamation plaintiff is not constrained by rules requiring proof of a causal connection between the defendant's conduct and the plaintiff's injury. Evidence that would be rejected elsewhere as too speculative will be admitted in a defamation case as lending substance to the injury presumed. *Compare My Sister's Place v. City of Burlington*, 139 Vt. 602, 433 A.2d 275, 281 (1981) and *Conover v. Baker*, 134 Vt. 466, 365 A.2d 264, 267-68 (1976) with the instant case.

\* See generally Veeder, *The History and Theory of the Law of Defamation I*, 3 Colum. L. Rev. 546 (1903) [hereinafter cited as Veeder I], and Veeder II, *supra* p. 11; Donnelly, *History of Defamation*, 1949 Wisc. L. Rev. 99 (1949); and Murnaghan, *supra* p. 11. The rule of liability without fault originated in the efforts of

rule is the product of any carefully framed assessment of the interests actually at stake. On the contrary:

[T]he . . . law of defamation is not the deliberate product of any period. It is a mass which has grown by aggregation, with very little intervention from legislation, and special and peculiar circumstances have from time to time shaped its varying course. The result is that perhaps no other branch of the law is as open to criticism for its doubts and difficulties, its meaningless and grotesque anomalies. It is, as a whole, absurd in theory, and very often mischievous in its practical operation.

Veeder I, *supra* note 9, at 546.

Nevertheless, the law of libel and slander remained essentially unchanged until 1964, when this Court considered for the first time "the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action . . . ." *New York Times Co. v. Sullivan*, 376 U.S. at 256. From that time to the present, the Court has sought to define "the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 325 (1974).

*New York Times* involved an advertisement critical of the Montgomery, Alabama police. An Alabama jury

English common law judges to wrest jurisdiction over defamation from the Ecclesiastical courts. Veeder I, at 558. The presumed damage rule was adopted during the Restoration largely as a means of permitting increased censorship over materials that posed a threat to the established order. Donnelly, *supra* p. 12, at 120-21.

found the advertisement false, and returned a general verdict for the police commissioner in the amount of \$500,000.00. In reversing the judgment, the Court expressed concern about juries' largely uncontrolled discretion to award damages under traditional notions of libel *per se*, even where there was no loss.<sup>10</sup> Writing for the majority, Justice Brennan noted that the fear of defamation verdicts

may be markedly more inhibiting than the fear of prosecution under a criminal statute. . . . The judgment awarded in this case—without the need for any proof of actual pecuniary loss—was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act.

376 U.S. at 277. Acknowledging that erroneous statement is inevitable in free debate, the Court concluded that some margin of error is required if the freedoms of speech and of the press are to have the "breathing space" that they "need \* \* \* to survive." 376 U.S. at 271-72 (citations omitted). The Court therefore held that a public official could not recover damages for defamation bearing on his official conduct absent proof of "actual malice"—that is, proof that the defendant knew that what he said was false or acted with

<sup>10</sup> In *New York Times*, "[t]he jury was instructed that, because the statements were libelous *per se*, 'the law \* \* \* implied legal injury from the bare fact of publication itself,' 'falsity and malice are presumed,' 'general damages need not be alleged or proved but are presumed,' and 'punitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown.'" 376 U.S. at 262. Virtually the same instructions were given in this case. (J.A. 18-20)

reckless disregard of whether it was false or not. 376 U.S. at 279-80.

In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 (1971), a plurality of the Court extended *New York Times* to all statements of "public or general concern." *Rosenbloom* produced five separate opinions and left the Court "sadly fractionated," *Gertz v. Robert Welch, Inc.*, 418 U.S. at 354 (Blackmun, J., concurring). The dissenting opinions of Justices Harlan and Marshall in *Rosenbloom* presaged the Court's analysis in *Gertz*. Justices Harlan and Marshall would have permitted private individuals to recover on any basis except liability without fault, but would have limited damages in such cases to actual injury. 403 U.S. at 69 (Harlan, J., dissenting); *id.* at 86-87 (Marshall, J., dissenting).<sup>11</sup>

<sup>11</sup> Justice Harlan reasoned that a law that allows unlimited damages for falsehoods that have done no harm

can only serve a purpose antithetical to those of the First Amendment. It penalizes speech, not to redress or avoid the infliction of harm, but only to deter the press from publishing material regarding private behavior that turns out to be false simply because of its falsity.

403 U.S. at 66 (Harlan, J., dissenting).

Justice Marshall also believed that the unlimited discretion exercised by juries in awarding punitive and presumed damages necessarily produc[ed] the impingement on the freedom of press recognized in *New York Times*.

....

.... This discretion allows juries to penalize heavily the unorthodox and the unpopular and exact little from others. Such freewheeling discretion presents obvious and basic threats to society's interest in freedom of the press and the utility of the discretion in fostering society's interest in pro-

In *Gertz v. Robert Welch, Inc.*, the Court criticized the *ad hoc*, content-based approach of the *Rosenbloom* plurality. 418 U.S. at 343, 346. The Court doubted the wisdom of committing to the judiciary issues of "which publications address issues of 'general or public interest'" or "what information is relevant to self-government." *Id.* at 346 (quoting *Rosenbloom*, 403 U.S. at 79 (Marshall, J., dissenting)). There was also concern that adherence to *Rosenbloom*

would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an *ad hoc* resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application.

418 U.S. at 343-44; See also *id.* at 354 (Blackmun, J., concurring) (definitive ruling in defamation area deemed "paramount" and "of profound importance").

In *Gertz* the Court abandoned *Rosenbloom*'s content-based approach and focused instead on the nature of the plaintiff. It held that the states need not require private plaintiffs to establish liability under the *New York Times* standard, and could define their own liability standards in such cases "so long as they do not impose liability without fault . . ." 418 U.S. at 347.

Acknowledging the "strong and legitimate state interest in compensating private individuals for injury to

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tecting individuals from defamation is at best vague and uncertain. These awards are not to compensate victims; they are only windfalls.

403 U.S. at 83, 84 (Marshall, J., dissenting).

reputation," the Court nevertheless found that the interest "extends no further than compensation for actual injury." *Id.* at 348-49. The Court described the rule of presumed damages as an "oddity of tort law."<sup>12</sup> The Court reasoned:

We would not, of course, invalidate state law simply because we doubt its wisdom, but here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved. *It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury.*

....

.... *More to the point, the States have no substantial interest in securing for plaintiffs*

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<sup>12</sup> 418 U.S. at 349.

Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. *The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms.* Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact.

*Id.* (emphasis added).

such as this petitioner gratuitous awards of money damages far in excess of any actual injury.

*Id.* at 349 (emphasis added).

The Court was equally concerned with the effect of punitive damages assessed in wholly unpredictable amounts bearing no necessary relationship to actual harm:

[J]ury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, *punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions*. They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.

418 U.S. at 350 (emphasis added).<sup>13</sup> The Court therefore held:

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<sup>13</sup> Justice Rehnquist has declared recently that:

[T]he doctrine of punitive damages has been vigorously criticised throughout the Nation's history. . . .

. . . .

Punitive damages are generally seen as a windfall to plaintiffs, who are entitled to receive full compensation for their injuries — but no more. Even assuming that a punitive "fine" should be imposed after a civil trial, the penalty should go to the state, not to the plaintiff — who by hypothesis is fully compensated. Moreover, although punitive damages are "quasi-criminal," their imposition is unaccompanied by the types of safeguards present in criminal proceedings. This absence of safeguards is exacerbated by

In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.

*Id.* at 350.

## II.

### THE NEW YORK TIMES AND GERTZ LIMITATIONS ON PRESUMED AND PUNITIVE DAMAGES FOR DEFAMATION SHOULD APPLY IRRESPECTIVE OF THE "NON-MEDIA" STATUS OF THE SPEAKER OR THE "COMMERCIAL OR ECONOMIC NATURE" OF HIS SPEECH.

#### A. The Rationale For The *Gertz* Limitations On Presumed And Punitive Damages Applies Without Regard To The Identity Of The Speaker Or The Content Of His Message.

D&B has been denied the constitutional protection of the *Gertz* limitations on presumed and punitive damages in this case. The Vermont Supreme Court fo-

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the fact that punitive damages are frequently based upon the caprice and prejudice of jurors. . . . Finally, the alleged deterrence achieved by punitive damage awards is likely outweighed by the costs — such as the encouragement of unnecessary litigation and the chilling of desirable conduct — flowing from the rule, at least when the standards on which the awards are based are ill-defined.

*Smith v. Wade*, 103 S.Ct. 1625, 164-42 (1983) (Rehnquist, J., dissenting) (joined by Burger, C.J. and Powell, J.) (citations omitted); *see also* Justice Marshall's views expressed in *Rosenbloom*, 403 U.S. at 82-85 (Marshall, J., dissenting).

cused on D&B's status as what it termed a "non-media" speaker and also on the content of its message. By doing so, it skewed the balance reached in *Gertz* between the competing interests of free speech and state defamation laws. By affirming the award of presumed and punitive damages it allowed the jury to compensate Greenmoss beyond any actual injury. It allowed the jury to punish D&B, not because of any showing of calculated falsehood, but simply because D&B's Special Notice turned out to be false.

The Vermont Supreme Court simply ignored the rationale for the *Gertz* limitations. In reasoning that *Gertz* should apply only to certain speakers or certain types of messages, that court overlooked the limited state interest at stake and disregarded the need to assure sufficient "breathing space" for the exercise of First Amendment rights. In doing so, it erred. The reasons for restricting defamation plaintiffs to actual damages absent a showing of "actual malice" apply to "non-media" speakers, and to speech about "commercial or economic" subjects, as they do anywhere else.

The holdings in *New York Times* and *Gertz* were not expressly limited to the "media." *New York Times* applied the same actual malice test not only to the *New York Times*, but also to the persons whose names had appeared in the advertisement at issue. *New York Times*, 376 U.S. at 286. Accord *St. Amant v. Thompson*, 390 U.S. 727 (1968) (*New York Times* test applied in case involving individual defendant not a member of the press); *Henry v. Collins*, 380 U.S. 356 (1965) (*New York Times* test for liability applied to a private individual's statements).

A holding that presumed and punitive damages may not be awarded for libel absent "actual malice" is es-

sential to afford sufficient "breathing space" for the publication of truthful information affecting economic decisions. There is no reason why the First Amendment should be construed to permit a plaintiff who has been defamed in a business context, or by a "non-media" speaker, a windfall denied to other private plaintiffs. The prospect of discretionary awards bearing no relation to actual harm would have a chilling effect on what is published and when. Whether the speaker is "media" or "non-media," or whether the speech is of an "economic" or other nature, the deterrent effect is the same. The free flow of information is inhibited.<sup>14</sup>

The interests of recipients of speech are no less at stake here than the interests of speakers.<sup>15</sup> In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), the Court acknowledged society's "strong interest in the free flow

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<sup>14</sup> The chill may be felt more strongly among "non-media" speakers than traditional "media." Technology has created new forms of processing and distributing information. Many new companies providing information services are currently operating at net losses. The threat of unlimited verdicts against these "non-media" speakers could force some of them to leave the market and raise entry barriers for others, thus chilling their speech permanently. See Amicus Curiae Brief of Information Industry Association at 14-15.

<sup>15</sup> The Court has "repeatedly stated that the First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression." *Saxbe v. Washington Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972). See also *United States Postal Service v. Council of Greenburgh Civic Association*, 453 U.S. 114, 152 (1981) (Stevens, J., dissenting) (presumptively unreasonable to interfere with ability of owner's receipt of messages he may want to receive).

of commercial information;" and pointed out that the "consumer's interest in the free flow of commercial information. . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763-64.

D&B's subscribers depend upon its reports to make business decisions, which often must be made quickly. If a credit applicant suffers a downturn in business while its application for credit is pending, the creditor would want to know that fact immediately. But if D&B were subject to unlimited awards of presumed and punitive damages in the manner of the Greenmoss and Sunward verdicts,<sup>16</sup> it would be reluctant to report the applicant's changed financial circumstances, at least until the information could be laboriously triple-checked. Even though the information might be dispatched to the creditor eventually, it might come too late for the information to be of any practical use.

In most situations, the subject of a financial report has a no less compelling interest in its timely delivery. Creditors rely upon financial reports in making their decisions. Creditors who lack timely information may deny a credit application out of hand or delay decision until the subject's business opportunity has passed.

Greenmoss contends that the *Gertz* limitations on presumed and punitive damages should be disregarded in this case because it involves constitutionally unprotected false speech. That contention lacks merit. All libel, including that in *New York Times* and *Gertz*, is by definition false speech. The rules limiting presumed

<sup>16</sup> Amicus Sunward Corporation won a \$3,847,488 presumed damages verdict against D&B. See Reply Brief of Petitioner at 3 n.3; Amicus Curiae Brief of Sunward Corporation at ii.

and punitive damages apply notwithstanding falsity in order to protect speech that matters. *Gertz*, 418 U.S. at 341. Here, as in *Gertz*, the Court is not called upon to protect false speech itself, but to tolerate a range of error so that timely, truthful information will not lose its utility.<sup>17</sup>

The Court has already considered the tension between the First Amendment and the law of defamation. In *Gertz*, it struck a balance which fairly serves the competing interests of free speech and personal reputation. The Court should not depart from that approach and embark upon the uncertain course the Vermont Supreme Court has charted. Instead, the time has come to carry *Gertz* to its necessary conclusion. The only way to ensure justice is to apply the same constitutional limitations on damages to every defamation defendant.

#### **B. The First Amendment Protects Freedom Of Expression And Does Not Accord Special Treatment To Any Group Of Speakers.**

The First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a

<sup>17</sup> If anything, there is even greater reason to limit presumed and punitive damages here than in *Gertz*. Indeed, Greenmoss' competing interest in this case is even less weighty than the plaintiff's in *Gertz*: like the subject of most defamations alleged in the business context, Greenmoss is a corporation whose range of potential injury is far narrower than a natural person's. A corporation's injury, if any, should be quantifiable and capable of proof. If no tangible harm can be shown, the First Amendment's interest should be overwhelming. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 66 (Harlan, J., dissenting).

free society." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). "The inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

In a variety of contexts, this Court has refused to acknowledge favored classes of speakers with greater constitutional protection than the ordinary citizen. "'[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . .'" *Bellotti*, 435 U.S. 790-91 quoting in part *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). "[N]either any news organization nor reporters as individuals have constitutional rights superior to those enjoyed by ordinary citizens. The guarantees of the First Amendment broadly secure the rights of every citizen; they do not create special privileges for particular groups or individuals." *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (Powell, J., dissenting) (emphasis added).

As Chief Justice Burger noted in his concurring opinion in *Bellotti*:

The very task of including some entities within the "institutional press" while excluding others, whether undertaken by legislature, court, or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country. *Lovell v. Griffin, supra*, 303 U.S. at 451-452. Further, the officials undertaking that task would be re-

quired to distinguish the protected from the unprotected on the basis of such variables as content of expression, frequency or fervor of expression, or ownership of the technological means of dissemination. Yet nothing in this Court's opinions supports such a confining approach to the scope of Press Clause protection. Indeed, the Court has plainly intimated the contrary view:

"Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets . . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.' . . . The informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public . . . ." *Branzburg v. Hayes*, 408 U.S. 665, 704-705 (1972), quoting *Lovell v. Griffin, supra*, 303 U.S., at 450, 452.

Because the First Amendment was meant to guarantee freedom to express and communicate ideas, I can see no difference between the right of those who seek to disseminate ideas by way of a newspaper and those who give lectures or speeches and seek to enlarge the audience by publication and wide dissemination. "[T]he purpose of the Constitution was not to erect the

press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it. ' . . . the liberty of the press is no greater and no less . . .' than the liberty of every citizen of the Republic." (*Pennekamp v. Florida*, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring)).

435 U.S. at 801-02 (Burger, C.J., concurring) (footnote omitted).

Drawing distinctions between speakers of the same defamatory words would raise serious equal protection problems. Writing for the majority in *Police Department of City of Chicago v. Mosley*, 408 U.S. 92 (1972), Justice Marshall reasoned that "under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Id.* at 96. He also noted that the Supreme Court had "frequently condemned such discrimination among different users of the same medium for expression." *Id.*

Recently, Justice Brennan expressed these same concerns in discussing a statutory scheme permitting illustrations of United States currency in certain media. *Regan v. Time, Inc.*, 52 U.S.L.W. 5084 (U.S. July 3, 1984) (Brennan, J., concurring in part and dissenting in part). He reasoned:

If § 504 permitted illustrations only in the enumerated publications on the theory that without regard to their potential use in counterfeiting relative to unlisted media—the specified media are the only places in which "legitimate" illustrations will appear, *it would, of course, rest on*

*a distinction among otherwise identical communications according to an utterly undefined and unjustified government selection of preferred speakers.* Cf. *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972).

*Id.* at 5094 n.13 (emphasis added).

The Vermont Supreme Court's "media"/"non-media" dichotomy creates practical problems no less important than the concerns expressed above. If the application of the constitutional limitations on presumed and punitive damages would now require a threshold ruling as to the defendant's status, the judiciary will be forced to define "media" and whether the defendant is a "media" speaker. Adoption of the "media"/"non-media" distinction would signal the return of the unpredictability the Court had hoped to dispel when it decided *Gertz*.<sup>18</sup>

Courts would undoubtedly base the "media"/"non-media" distinction upon their perceptions of the worth of the speech and the popularity of the speaker. The dangers of that approach are obvious. Unpopular speakers would be given less protection, not because what they say is less important, but because the majority does not like their message.

No majority is wise or benevolent enough to determine which speech is important and which is not. By enhancing the free flow of all messages, the First Amendment ensures that everyone—majorities and minorities—can help to

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<sup>18</sup> In all but the most obvious situations, the "media"/"non-media" distinction would be impossible to apply. See Brief of Petitioner at 22.

generate the ideas "members of society [need] to cope with the exigencies of their period."

Individuals need information about the reputations of other members of the groups they interact with at least as much as—if not more than—they need information about the character of candidates for public office. Ordinary speakers require breathing space for nonpublic speech just as the media require it for public speech. . . ."<sup>19</sup>

<sup>19</sup> There is no reason to believe that a message broadcast by a "media" voice promotes public or political goals any better than the message of a "non-media" speaker. To the contrary:

Public issues can be debated with as much force among individuals as in the press. . . [T]he mass press does not originate ideas; it spreads them around, shaping, leveling, and smoothing them in the process. . . . The process has its uses, to be sure, but someone must still dig. And in the field of human ideas and their original expression, that function belongs first to individuals. . . . Nonmedia speech is always the antecedent of media speech. . . . [I]t is not sensible to treat two speakers differently merely on the ground that one proposes to speak privately while one intends to use the media.

Lange, *The Speech and Press Clauses*, 23 U.C.L.A. L. Rev. 77, 116-17 (1975) (footnote omitted). Accord *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 592, 350 A.2d 688, 695 (1976) ("Issues of public interest may equally be discussed in media and non-media content, and the need for a constitutional privilege, therefore, obtains in either case."); Restatement (Second) of Torts § 580A comment h (1976). *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 782 (1978), ("[T]he press does not have a monopoly on either the First Amendment or the ability to enlighten.")

Note, *Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Nonmedia Defendants*, 95 Harv. L. Rev. 1876, 1881, 1894 (1982).

A "media"/"non-media" distinction would promote injustice of the worst sort. "Media" and "non-media" defendants tried together would be governed by different standards. A newspaper publishing an individual's statement verbatim could "create" a constitutional privilege that would not otherwise apply.<sup>20</sup> Another individual who then repeated the newspaper's statement without knowledge of any falsity could then be held liable for both presumed and punitive damages.<sup>21</sup> Or,

<sup>20</sup> See Comment, *The Constitutional Law of Defamation: Are All Speakers Protected Equally?*, 44 Ohio St. L.J. 149, 171 (1983) ("[I]t is absurd to consider that a letter published in a letters-to-the-editor column of a newspaper would be constitutionally protected, while the same words spoken to a friend or neighbor would not.") (footnote omitted).

<sup>21</sup> See Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349 (1975):

[T]he reasons given by the Court for its hostility to strict liability for innocent defamation by the press would seem equally appropriate to innocent defamation by non-media defendants, especially where an individual's defamatory statement is likely to cause less harm because of its more limited dissemination. In addition, imposition of strict liability upon individuals who are apt to be both less circumspect in their name-calling and less aware of the risk of liability and thus less likely to insure against it, seems to make less sense as a matter of tort law than imposing strict liability upon large enterprises whose daily operations pose a substantial risk of predictable harm.

*Id.* at 1418 (emphasis added) (footnote omitted). Accord Collins & Drushal, *Reaction of the State Courts to Gertz v. Robert Welch, Inc.*, 28 Case W. Res. L. Rev. 306, 334 (1978); Wade, *The*

as in this case, the same information published by D&B would be judged differently if published in a local newspaper.<sup>22</sup>

In 1972, Justice White, writing for the majority in *Branzburg v. Hayes*, 408 U.S. 665 (1972), recognized:

The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses

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*Communicative Torts and The First Amendment*, 48 Miss. L. J. 671, 699-700 (1977).

<sup>22</sup> The situation posited is much more than hypothetical. The history section of D&B reports often contains information about the background of principals that may include criminal convictions. R. Cole, *Consumer and Commercial Credit Management* 350-52 (7th ed. 1984). The very same criminal history information that appears in a D&B report will often appear in a newspaper. For example, The Burlington Free Press, Vermont's largest newspaper, regularly publishes a section entitled "Day In Court." The section is a simple listing of the actions taken in various cases, *see, e.g.*, The Burlington Free Press, Feb. 28, 1984, at 3B col. 1:

John E. Kimber, 22, of Franklin Square—charged with retail theft in Essex Nov. 19; pleaded guilty; sentenced to up to 30 days, suspended.

Roger Raymond, 26, Colchester—charged with possession of stolen property in Colchester Dec. 6; pleaded guilty; sentenced to up to six months, suspended.

Karen Tuttle, 24, St. Albans—charged with bad check in St. Albans Sept. 13; pleaded guilty; sentenced to up to one year, suspended, probation.

*Id.* (three representative entries from the 39 items appearing in "Day In Court").

carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.

*Id.* at 703-04.<sup>23</sup>

Justice White's observations are even more apt today. Whatever was considered the "media" in 1776 is not the "media" of today. What would be considered today's "media" may give way to a new and different "media" by the year 2000.<sup>24</sup> While advances in photocomposition methods may have changed the media in the 1960s and 1970s, the age of electronic communications changes it today.

Although the methods of communication have constantly changed, the constitutional principles underlying the rationale of *Gertz* have not. The justifications for limiting presumed and punitive damages—the absence of state interest and the fear that uncontrolled jury discretion would inhibit the exercise of First Amendment freedoms—do not depend upon the identity of the speaker or his mode of communication. The need to avoid punishing the free flow of information exists regardless of the medium through which the in-

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<sup>23</sup> Justice Brennan agreed recently when he observed that defining media such as journals, newspapers or albums is "anyone's game to play." *Regan v. Time, Inc.*, 52 U.S.L.W. at 5096 n.22 (Brennan, J., concurring in part and dissenting in part) (*quoting with approval Time, Inc. v. Regan*, 539 F.Supp. 1371, 1390 (S.D.N.Y. 1982)).

<sup>24</sup> Ours has become an information society, but only a small percentage of that information is provided by the "media." Increasingly in the next decades, Americans will base their decisions on data drawn from other sources. Granting special constitutional status to the "media" would therefore ignore the realities of our time. *See Amicus Curiae Brief of Information Industry Association* at 3-6.

formation flows. Constitutional limitations against presumed and punitive damages should apply whether the speaker uses a handbill or the latest in computer technology.

**C. There Is No Sound Basis For Distinguishing Speech Of A "Commercial Or Economic Nature" From Other Speech In Applying The Gertz Limitations On Presumed And Punitive Damages For Defamation.**

The rule of *New York Times* and *Gertz* regarding presumed and punitive damages should apply "where the speech is of a commercial or economic nature." The interests at stake remain the same whether the defamatory statement has to do with business, social, artistic, academic, or political matters. The rationale for the rule does not permit distinctions among different defamatory words any more than it permits distinctions among different defamatory speakers.

**1. The Constitutional Rule of *New York Times* and *Gertz* Was Designed to Avoid Content-Based Distinctions, Which Fail to Strike a Proper Balance of the Competing Interests.**

This Court's defamation decisions have expressly disclaimed emphasis on subject-matter criteria for First Amendment protection. See *New York Times*, 376 U.S. at 271 ("the constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'") (quoting *NAACP v. Button*, 371 U.S. 415, 445 (1963)); *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) ("the guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government."); *Time, Inc. v. Firestone*, 424 U.S. 448, 456 (1976).

The actual malice test was designed specifically to prevent constitutional protections from varying with the content of the speech involved. In the plurality opinion for the Court in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), Justice Harlan explained that the focus should be on the conduct of the defendant, *not* the content of his message:

Impositions based on misconduct can be neutral with respect to content of the speech involved, free of historical taint, and adjusted to strike a fair balance between the interests of the community in free circulation of information and those of individuals in seeking recompense for harm done by the circulation of defamatory falsehood.

*Id.* at 153. As Justice Rehnquist observed in his majority opinion in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976):

Whatever their general validity, use of such subject-matter classifications to determine the extent of constitutional protection afforded defamatory falsehoods may too often result in an improper balance between the competing interests in this area. It was our recognition and rejection of this weakness in the *Rosenbloom* test which led us in *Gertz* to eschew a subject-matter test.

*Id.* at 456.

The subtle ambiguities of the English language make it possible to categorize the same defamatory words in a number of different ways. One person may take a broad view of a given subject-matter class, while another may choose a much narrower definition. As a

result, distinctions based on subject matter are inevitably unreliable. Distinctions of that sort tend to make free speech less free. They introduce an evaluative element that invites abuse, leaving freedom of speech dependent upon varying assessments of the intrinsic worth of what is said.

Judicial attempts to regulate content interfere with a process that the First Amendment reserves to the marketplace of ideas. *See Dun & Bradstreet, Inc. v. Grove*, 404 U.S. 898 (1971) (Douglas, J., dissenting from denial of certiorari). “[I]f the rough and tumble of debate is the best vehicle for producing approximations of factual truth or preferred opinion, the courts have no business making premature and interim evaluations of contested statements’ merits.” *Id.*

Content-related rules conflict with our most fundamental concept of free speech:

[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”

*Police Department of City of Chicago v. Mosely*, 408 U.S. 92, 95-96 (1972) (quoting *New York Times Co. v.*

*Sullivan*, 376 U.S. 254, 270 (1964)) (citations omitted).<sup>25</sup>

As Justice White declared for the majority in *Regan v. Time, Inc.*, 52 U.S.L.W. 5084 (U.S. July 3, 1984), “Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.” *Id.* at 5087.

**2. The Safeguards of the First Amendment Extend to Speech of a “Commercial or Economic Nature.”**

“Speech of an economic or commercial nature” is just as worthy of First Amendment safeguards as any other kind of speech. Whatever its parameters, such speech contributes to the free flow of information no less than speech on other subjects:

Certainly such speech could not be regarded as less important than political expression. When immersed in a free flow of commercial information, private sector decisionmaking is at least as effective an institution as are our various governments in furthering the social interest in obtaining the best general allocation of resources. *Baumol, Economic Theory And Operations Analysis*, 249-256 (1961); *Braff, Microeconomic*

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<sup>25</sup> *Accord Metromedia, Inc. v. San Diego*, 453 U.S. 490, 519 (1981) (First Amendment neutrality violated by decision “to favor certain kinds of messages over others”); *United States Postal Service v. Council of Greenburgh Civic Association*, 453 U.S. 114, 132 (1981) (valid restrictions on time, place and manner of speech must be “content-neutral”); *see generally Note, supra* p. 29, at 1880-82 (anti-content-regulation principle is “implicit in the Court’s First Amendment cases”), and cases cited therein.

*Analysis*, 259-276 (1969); Dorfman, *Prices and Markets*, 128-136 (3d Ed. 1967).

*Dun & Bradstreet, Inc. v. Grove*, 404 U.S. 898, 905 (1971) (Douglas, J., dissenting from denial of certiorari).<sup>28</sup>

Commentators have agreed:

[F]or the bulk of mankind . . . freedom of choice as owners of resources in choosing within available and continually changing opportunities, areas of employment, investment, and consumption is fully as important as freedom of discussion and participation in government.

Director, *The Parity of the Economic Marketplace*, 7 J. Law & Economics 1, 6 (1964). Accord Coase, *Advertising and Free Speech*, 6 J. Legal Studies 1 (1977); see also R. Posner, *Economic Analysis of Law* 549-51 (2d ed. 1977); M. Friedman, *Capitalism and Freedom* 7-9 (1962); P. Samuelson, *Economics* 44 (8th ed. 1970) (noting that idealized model of efficient competitive market mechanism presumes well-informed decision makers); Beales, *The Efficient Regulation of Consumer Information*, 24 J. Law & Economics 491, 514 (1981) ("[G]overnmental restraints on the free flow of information . . . often tend to inhibit competition,

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<sup>28</sup> In a footnote, Justice Douglas added that,

Presumably the credit reports published by the petitioner facilitate through the price system the improvement of human welfare at least as much as did the underlying disagreement in our most recent libel opinion, *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), arising out of a squabble over whether a vendor had sold obscene magazines.

*Dun & Bradstreet v. Grove*, 404 U.S. at 906 n.9 (Douglas, J., dissenting from denial of certiorari).

with consequent efficiency losses."); Benham, *Regulating Through the Professions: A Perspective on Information Control*, 18 J. Law & Economics 421, 422 (1975) (restraints on commercial flow of information decrease competition and result in higher prices.)

As the Court held in *Virginia State Board of Pharmacy v. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976):

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. See *Dun & Bradstreet, Inc. v. Grove*, 404 U.S. 898, 904-906 (1971) (Douglas, J., dissenting from denial of certiorari). See also, *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 603-604 (1967) (Harlan, J., concurring). And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

*Id.* at 765 (footnotes omitted).

The proper allocation of economic resources depends upon the free and available flow of financial information. Such information not only benefits the bus-

iness who wishes to obtain credit, but also aids the creditor who uses it to structure his trading relationships. Financial reporting companies such as D&B serve the interests of both groups by specializing in the efficient and comprehensive dissemination of information with respect to the financial status of a company, its payment history, banking relationships, operations, finances and officers.

The fact that particular speech is authored by a profitmaking enterprise certainly does not make it less "valuable" under the First Amendment. "That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952). The idea that profit motives are antithetical to the First Amendment has been rejected wherever it has appeared. See, e.g., *New York Times*, 376 U.S. at 266 (1954); *Time, Inc. v. Hill*, 385 U.S. 374, 397 (1967); *Virginia State Board*, 425 U.S. at 761; *Cammarano v. United States*, 358 U.S. 498, 514 (1959) ("those who make their living through exercise of First Amendment rights are no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive.") (Douglas, J., concurring).

Conversely, the fact that the audience has an economic motivation for reading a publication should not be determinative:

Neither a labor leader's exhortation to strike, nor an economist's dissertation on the money supply, should receive any lesser protection because the subject-matter concerns only the economic interests of the audience. Nor should the

economic motivation of a speaker qualify his constitutional protection; even Shakespeare may have been motivated by the prospect of pecuniary reward.

*Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 579-80 (1980) (Stevens, J., concurring).

With the exception of the narrow category of "commercial speech," involving advertising and promotional materials (see *infra* pp. 40-43), this Court's decisions have accorded speech of a "commercial or economic nature" full First Amendment protection. As this Court stated in *Thornhill v. State of Alabama*, 310 U.S. 88 (1940):

The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communications of ideas to discover and spread political and economic truth.

*Id.* at 95 (emphasis added); see also *Abood v. Detroit Board of Education*, 431 U.S. 209, 231 (1977) ("[O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection.") (emphasis added); *Bose Corp. v. Consumers Union of United States, Inc.*, 104 S.Ct. 1949 (1984) (*New York Times* "actual malice" review undertaken with respect to report about a loudspeaker system); *Regan v. Time, Inc.*, 52 U.S.L.W. 5084 (U.S. July 3, 1984) (ban on

photographic reproduction of currency held to violate First Amendment).

The Court long ago rejected the notion that First Amendment protections extended only to "political" or some similarly narrow range of subjects. Although the lower court regarded "political speech" as the First Amendment's sole concern, the Constitution protects far more:

[T]he First Amendment does not protect speech and assembly only to the extent it can be characterized as political. "Great secular causes, with small ones, are guarded . . . and the rights of free speech and a free press are not confined to any field of human interest."

*United Mine Workers of America, District 12 v. Illinois State Bar Association*, 389 U.S. 217, 223 (1967) (quoting *Thomas v. Collins*, 232 U.S. 516, 531 (1945)). See also *Thornhill v. State of Alabama*, 310 U.S. 88, 102 (1940) ("[F]reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.").

### 3. The Information Conveyed by D&B's Financial Reports Is Not Commercial Speech.

The Court has adopted a special analysis for a narrow category of communications it has described as "commercial speech." Cases involving "commercial speech," however, have nothing to do with tort actions for damages. Rather, they concern the States' attempts to regulate or prohibit advertising and closely related methods of commercial solicitation. See *Virginia State Board of Pharmacy v. Virginia Citizens Consumer*

*Council, Inc.*, 425 U.S. 748 (1976) (ban on advertising by pharmacists); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (restrictions on attorney advertising and solicitation); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978) (attorney advertising and solicitation); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977) (signs advertising sale of residential property); *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981) (billboard advertising); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980) (advertising by a public utility); *Bolger v. Youngs Drug Products Corp.*, 103 S.Ct. 2875 (1983) (birth control advertisements).

Speech about commerce is not "commercial speech." Communications about business-related matters, including the speech at issue in this case, possess none of the unique characteristics of "commercial speech."<sup>27</sup> Greenmoss admits that D&B's publication was not an

<sup>27</sup> The Court has identified two aspects of "commercial speech" not present here which justify interference that the First Amendment might prohibit in other contexts: (1) "commercial speech" concerns the speaker's own product and is therefore easily verified; and (2) the speaker's economic motive to disseminate messages encouraging recipients to do business with him renders "commercial speech" particularly "hardy." *Central Hudson*, 447 U.S. at 564 n.6. Both factors contemplate advertising, and are not present outside that context.

The statement "Greenmoss is bankrupt" does not proclaim the relative advantage of D&B's financial reports over any of its competitors'. It simply conveys information. The fact that the information appears in a financial report should not make it commercial speech when it would not be regarded as such if it appeared in a newspaper. Financial reports are no more "hardy" than newspapers and the information is no more "verifiable." Both provide information for a price, but as noted *supra* p. 38, that does not deprive them of First Amendment protection. See also

advertisement and did not propose a commercial transaction. (Brief of Respondent at 15, 23-24). It concedes that the publication did not consist of statements made solely in the economic interest of the speaker or the audience. (Brief of Respondent at 23-24). Nothing in the Special Notice promotes the speaker (D&B), or the speaker's product. Rather, D&B's report concerns information about a third party (Greenmoss), published to entities with whom D&B already had established a relationship.

"Commercial speech" cases concern a legislative interest in regulating the conduct of sellers in proposing commercial transactions. That interest relates to the *contractual* aspect of speech and is no different from those which justify liability for fraud and breach of contract based upon language used in connection with a sales transaction. The state is regulating conduct in commercial proposals which incidentally involves speech. The interest totally disappears where, as here, a statement about a firm, product, or service is made by someone other than its seller. In such cases, the statements are not promotional, but serve solely an informative function entitled to full First Amendment protection.<sup>28</sup>

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Brief of Amicus Curiae Dow Jones and Co., Inc. at 10-12; Reply Brief of Petitioner at 11-12.

<sup>28</sup> As one commentator has noted:

Not even the strongest partisan of content neutrality would argue that contractual liability cannot be validly imposed on the basis of the content of the language used in the contract. The reason appears to be that the use of language to form contracts is not the sort of "speech" to which the first amendment applies.

....

In any event, characterizing D&B's speech as "commercial speech" would not aid in resolving the issues before the Court. States allow damages for defamation in order to compensate plaintiffs injured by defamatory statements, *not* as a part of a regulatory scheme protecting the recipients of contractual proposals. There is nothing about this defamation action which implicates any state regulatory interest of the type encountered in the Court's "commercial speech" cases.

Even if financial reports could be categorized as "commercial speech," the First Amendment still would not permit unlimited amounts of presumed and punitive damages for negligently made false statements in those reports. A state regulation impacting on commercial speech is upheld only where it "is no more extensive than necessary to further the State's interest" which must be "substantial." *Central Hudson*, 447 U.S. at 568. But in defamation cases where liability is based on a lesser standard of fault than "actual malice," the only substantial state interest to be furthered is that of compensating actual injury. *Gertz*, 418 U.S. at 348-49. As this Court has held, presumed and punitive damages are wholly irrelevant to that interest. Thus no matter how the speech is categorized, the

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The critical factor seems to be whether a State rule is based on the informative function or the contractual function of the language.

....

.... [T]he State interest [in regulating the contractual function of speech] disappears when the statements are made by a third person with no relation to the transaction.

Farber, *Commercial Speech And First Amendment Theory*, 74 Nw. U.L. Rev. 372, 386-88 (1979).

First Amendment will not permit presumed and punitive damages for defamation absent "actual malice."

**4. The Phrase "Commercial or Economic Nature" Cannot Be Applied Predictably from One Communication to the Next.**

The words "commercial or economic nature" would include not just advertising and promotional materials, but also everything else said or written about business, finance, or commerce by any speaker, whether public or private, "media" or "non-media." Using "economic" in the broad sense of the word, "speech of a commercial or economic nature" would include virtually every communication made, considered, or relied upon for the structuring of social, commercial, and even governmental relationships.

The task of setting limits on "speech of a commercial or economic nature" is no more appealing than the prospect of groping toward a reliable definition of the "media." Both would necessitate an inevitably unpredictable, case-by-case analysis. Both would leave open the possibility of windfall verdicts at the expense of chilling speech that matters.

In our society, there is no clear line between commercial or economic matters on one hand and social or political matters on the other. The statement that a major bank's foreign loan portfolio is sub-standard, for example, may seem "economic" in one circumstance, but "political" in another. In both circumstances, though, the words remain the same. In either instance, if the statement is false when made, it may cause harm to the bank in question. In view of that, it makes no sense to formulate restraints on defamation damages in terms of the subject matter of the speech. Regardless of the message in a given case, the constitutional

rule of *New York Times* and *Gertz* with respect to presumed and punitive damages strikes the just accommodation between the competing interests at stake: compensation is allowed for any actual resulting harm, while speakers are relieved of the threat of unlimited punishment that might silence them altogether.

**CONCLUSION**

Based upon the foregoing, Petitioner Dun & Bradstreet, Inc. respectfully urges the Court to reverse the judgment of the Vermont Supreme Court and order a new trial.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1983

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DUN & BRADSTREET, INC.,  
Petitioner,  
v.

GREENMOSS BUILDERS, INC.,  
Respondent.

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On Writ of Certiorari to the  
Supreme Court of the State of Vermont

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**MOTION FOR LEAVE TO FILE A BRIEF  
AS AMICUS CURIAE AND BRIEF OF THE  
AMERICAN FEDERATION OF LABOR AND CONGRESS  
OF INDUSTRIAL ORGANIZATIONS  
AS AMICUS CURIAE IN SUPPORT OF PETITIONER**

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1983

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No. 83-18

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DUN & BRADSTREET, INC.,  
*Petitioner,*  
v.

GREENMOSS BUILDERS, INC.,  
*Respondent.*

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**On Writ of Certiorari to the  
Supreme Court of the State of Vermont**

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**MOTION BY THE AMERICAN FEDERATION OF LABOR  
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS  
FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE  
IN SUPPORT OF PETITIONER**

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The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby moves for leave to file the attached brief *amicus curiae* in support of the position of the petitioner. Counsel for petitioner has consented to the filing of that brief but counsel for respondent has declined to do so.

The AFL-CIO is a federation of 95 national and international unions having a total membership of 13,500,000 working men and women. The questions the Court has posed in its Order of July 5, 1984 in this case concern the extent to which the rule of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, precluding the award of presumed

and punitive damages in defamation actions by private individuals apply to "non media" defendants and to "speech of a commercial or economic character." If Dun & Bradstreet is not part of the "media," neither is the AFL-CIO or its affiliated unions. And if the financial reports at issue here are "speech of a commercial or economic nature" so is much of the AFL-CIO's speech and that of its affiliated unions. Thus the answer to the questions posed by the Court could well increase the dangers faced by the labor movement in defamation actions. That being so the AFL-CIO seeks this opportunity to respond to those questions.

For the foregoing reason, this motion for leave to file the attached brief *amicus curiae* should be granted.

Respectfully submitted,

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Supreme Court of the State of VermontBRIEF OF THE AMERICAN FEDERATION OF LABOR  
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS  
AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This brief of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) as *amicus curiae* is filed contingent on the granting of the attached motion for leave to file said brief. The AFL-CIO's interest in this case is described in that motion.

## SUMMARY OF ARGUMENT

## I.

The First Amendment rule against presumed and punitive damages announced in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (*Gertz*), should govern whether the defendant is or is not part of the "media." The distinction between "media and non-media defendants" is not self-

defining and has not been defined by this Court; for example there appears to be little difference between petitioner Dun & Bradstreet's (D&B) financial reports and the financial reports in mass circulation newspapers. Compare *Branzburg v. Hayes*, 408 U.S. 665, 704-705. In any event, there should be no First Amendment definition based on the identity of the speaker or publisher. *Gertz* recognized that while there is a strong and legitimate state interest in compensating private individuals for injury to private reputation, that interest—which is counterbalanced by the interest in uninhibited free speech—"extends no further than compensation for actual injury." 418 U.S. at 348-349. A considered weighing of these interests and a recognition of the hazards of broad jury discretion in awarding damages underlies the *Gertz* rules.

The force of these considerations is not in the least attenuated in a suit against a "non-media" defendant. If anything, the state's interest in protecting against injury to reputation is greatest where the defamation has received wide circulation. And the First Amendment value of a statement cannot, on principle, be held to depend on the identity of the speaker. "In the realm of protected speech, the legislature is constitutionally disqualified from dictating . . . the speakers who may address a public issue." *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 784-785. See also *id.* at 795-802 (Burger, C.J., concurring); *Bridges v. California*, 314 U.S. 252, 277-278; *Pennekamp v. Florida*, 328 U.S. 331, 364 (Frankfurter, J., concurring).

## II.

*Gertz'* rule against presumed and punitive damages should also apply when the speech is of a "commercial or economic nature." The speech here is not "commercial speech" as this Court has defined that term and, aside from such "commercial speech," there should be no category of "speech of a commercial or economic nature"

entitled to lesser First Amendment protection than other forms of speech.

(a) D&B provides its subscribers information on the financial status of business entities. The substance of D&B's reports is akin to that of the financial reports in *The New York Times* and *The Wall Street Journal*, or on the television program *Wall Street Week*. On its face then, D&B's speech is a part of the free interchange of information on matters of interest and concern regarding the functioning of the commercial sector of the society. The First Amendment is intended to protect such interchange.

D&B's speech has none of the earmarks of the category of speech this Court has distinguished from other speech under the rubric of "commercial speech." For purposes of First Amendment analysis that concept has consistently been limited to "purely commercial advertising," *Valentine v. Chrestensen*, 316 U.S. 52, 54, and to "speech which does 'no more than propose a commercial transaction,'" *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 762 (quoting *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376, 385). See also *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 n.6 distinguishing *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530.

(b) D&B's reports are "commercial or economic in nature" in that the reports are prepared and published for sale at a profit, and thus for D&B's ultimate economic benefit, and the subject matter of the reports is the financial condition of business entities. Neither of these factors is a basis for affording the reports diminished First Amendment protection. The speaker's ultimate objective of enhancing his economic situation is not a basis for reducing the degree of First Amendment protection afforded to his speech. *New York Times v. Sullivan*, 376 U.S. 254, 266. See also, e.g., *Consolidated Edison*, *supra*; *Thornhill v. Alabama*, 310 U.S. 88, 102-105; *Thomas v. Collins*, 323 U.S. 516, 531-532.

Similarly, the fact that D&B's reports concern business finances—the other respect in which the reports are “commercial or economic in nature”—cannot be a basis for diminishing First Amendment protection. To do so would be to subject the financial section of *The New York Times* and most of *The Wall Street Journal* to lesser First Amendment protection than other news in those publications. But in a free enterprise economy speech relating to financial or economic matters, private as well as public, is an important part of the national discourse. See *Thornhill v. Alabama*, 310 U.S. at 102-103; *Thomas v. Collins*, 323 U.S. at 531-532.

(c) Finally, even if D&B's reports were entitled to some lesser degree of First Amendment protection the *Gertz* rule against presumed and punitive damages should apply. No matter how characterized D&B's reports are speech of some value under the First Amendment, and *Gertz* squarely rejected any test based on the nature and importance of the speech at issue. See 418 U.S. at 346.

#### ARGUMENT

(1) *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, which involved a defamation suit by a “private individual” (*id.* at 348), against the publisher of a monthly magazine, “hold[s] that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth” (*id.* at 349).<sup>1</sup> The Court has now asked the parties in the instant case to address whether this rule against presumed and punitive

<sup>1</sup> The *Gertz* Court cautioned (*id.* at 348):

Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential. Cf. *Time, Inc. v. Hill*, 385 U.S. 374 (1967). Such a case is not now before us, and we intimate no view as to its proper resolution.

damages should apply “where the suit is against a non-media defendant.” Order of July 5, 1984, — U.S. —, 52 L.W. 3937.<sup>2</sup> It is our submission that the *Gertz* rule against presumed or punitive damages should apply regardless of whether the defendant may be labeled a “media” or a “non-media” defendant.

(a) It facilitates analysis to start by recognizing that the terms “media” and “non-media” are not self-defining and have not been defined by this Court. Thus, for example, although petitioner, Dun & Bradstreet (“D&B”), has never questioned the point, it is far from clear that D&B is a “non-media defendant.”<sup>3</sup> D&B is in the busi-

<sup>2</sup> The Court's Order refers not only to the rule of *Gertz* but also to the rule of *New York Times Co. v. Sullivan*, 376 U.S. 254. *New York Times* holds that the First Amendment “prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made . . . with knowledge that it was false or with reckless disregard of whether it was false or not.” *Id.* at 279-280. (In *Curtis Publishing Co. v. Butts*, 388 U.S. 130, the *New York Times* rule was extended to cover “public figures”.) In *New York Times* that rule of liability was applied to protect the co-defendant individuals who composed and signed the advertisement at issue as well as the newspaper which published that advertisement. 376 U.S. at 285-286. In this brief we proceed on the premise that the reference to *New York Times* in this Court's Order in the instant case was meant to emphasize *Gertz*'s status as a further step in the elaboration of the generative principles stated in *New York Times* and was not meant to signify an intent to reopen *New York Times*' holding that the rules governing defamation actions brought by “public figure” plaintiffs apply to both “media” and “non-media” defendants.

<sup>3</sup> D&B has also not questioned in this Court the status of respondent Greenmoss Builders, Inc. as a “private individual” plaintiff rather than as a “public figure” plaintiff. That issue too is not free from doubt. As we develop at pp. 7-8, *infra*, *Gertz*' rationale for granting the “States . . . substantial latitude . . . to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual” rests in large part on “our basic concept of the essential dignity and worth of every human being” which, because that individual “has relinquished no part of his interest in the protection of his own good name,” creates a “compelling call on the

ness of publishing particularized information to its delimited group of subscribers. *Branzburg v. Hayes*, 408 U.S. 665, points toward the conclusion that one in that business is a member of the "press," and perhaps of the "organized press," and, in that sense, part of the "print media":

Freedom of the press is a "fundamental personal right" which "is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. Griffin*, 303 U.S. 444, 450, 452 (1938). See also *Mills v. Alabama*, 384 U.S. 214, 219 (1966); *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943). The informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public. . . . [408 U.S. at 704-705.]

See also *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 801-802 (Burger, C.J., concurring).

The difference between D&B's financial reports and, for example, mass circulation newspapers, which would presumably be included in any definition of "media," is one of degree: D&B publishes more specialized information for a smaller group of readers. And, there are in turn differences of degree between D&B and speakers who are not in the communications business, and who reach an even smaller audience. As we now show, no

courts for redress of injury inflicted by defamatory falsehood." That part of *Gertz*' rationale is not easily fitted to a business corporation plaintiff. Cf. *Bose Corp. v. Consumers Union*, — U.S. —, 104 S.Ct. 1949, 1953-1954. However, we do not attempt to treat with this issue because it is not encompassed in the questions presented or those posed by this Court.

differences in First Amendment protection should turn on such differences.

(b) The *Gertz* analysis begins from the "common ground" (418 U.S. at 339) that

Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. . . . And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press.

\* \* \* \*

The need to avoid self-censorship by the news media is, however, not the only societal value at issue. . . . The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose, for, as MR. JUSTICE STEWART has reminded us, the individual's right to the protection of his own good name

reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. . . . *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (concurring opinion).

Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury. . . . In our continuing effort to define the proper accommodation between these competing concerns, we have been especially anxious to assure to the freedoms of speech and press that "breathing space" essential to their fruitful exercise. *NAACP v. Button*, 371 U.S. 415, 433 (1963). To that end this Court has extended a measure of strategic protection to defamatory falsehood. [418 U.S. at 340-342.]

The *Gertz* Court then discussed the differences between defamation actions brought by public officials and public

figures on the one hand and by private individuals on the other "that require that a different rule" than that stated in *New York Times* apply to the latter (*id.* at 342-343), and canvassed the considerations militating toward the conclusion that the "States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual (*id.* at 343-346). In so doing, the Court expressly rejected a "public or general interest" test for determining the applicability of the *New York Times* standard to private defamation actions"—viz., a test based not on the plaintiff's status but on whether "the publication address[es] issues of 'general or public interest.'" *Id.* at 346.

On the basis of that discussion the Court recognized both that there is a "strong and legitimate state interest in compensating private individuals for injury to reputation" and that, in defamation cases where liability is based on a showing of less than knowing falsity or reckless disregard of the truth, "*this countervailing state interest [to the interest in free speech] extends no further than compensation for actual injury.*" *Id.* at 348-349, emphasis added. The Court ruled that presumed damages extend beyond the scope of the state's legitimate interest as thus defined (*id.* at 349):

Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this peti-

tioner gratuitous awards of money damages far in excess of any actual injury.

The Court reached the same conclusion with respect to punitive damages (*id.* at 350):

In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence. In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.

(c) The identity of the defendant-publisher does not transmute the insubstantial state interest in allowing a private individual to recover presumed or punitive damages in a defamation action into a substantial state interest. The same information, or in this case misinformation, that D&B reported to its subscribers—Greenmoss' purported bankruptcy petition—could have been reported in *The New York Times* or *The Wall Street Journal*. And, the state's interest would appear to be at its highest when the defendant is a publisher of a newspaper of mass circulation as opposed to a publisher or speaker whose communications do not command so wide an audience; the wider the audience, the greater the capacity

for a defamatory falsehood to do harm. Thus the critical point is that whether the misinformation is published by D&B or by the *Times* or the *Journal*, each of the reasons given in *Gertz* for concluding that the state interest in allowing presumed and punitive damages is insubstantial applies: if such damages were allowed, juries "could award substantial sums . . . without any proof . . . [of] harm"; juries would have "uncontrolled discretion" and would be able to punish "unpopular opinion"; awards of money damages in excess of actual injury would be "gratuitous"; and the award of "punitive damages [would be] wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions."<sup>4</sup> Certainly there is no basis for the belief that "non-media" defendants as a class are less likely to engage in self censorship if faced with these dangers than "media" defendants as a class.

(d) Given the demonstration to this point, only if the First Amendment value of D&B's reports is less than that of the *Times* or the *Journal*—where all three have the same content—could there be a basis for concluding that the fact that D&B is the publisher, rather than the *Times* or the *Journal*, should result in a different constitutional rule with regard to the recovery of presumed and punitive damages in defamation actions. Indeed, for that fact to be a proper basis for allowing such damages the First Amendment value of D&B's publication would have to be so insubstantial as to be insufficient to overcome the insubstantial state interest in permitting the class of private individuals to recover such damages.

The proposition that the extent of First Amendment protection turns on the identity of the speaker is con-

<sup>4</sup> The jury's award in the instant case—\$50,000 compensatory damages and \$300,000 punitive damages in a case where the complaint demanded \$7,500 in compensatory damages and \$15,000 in punitive damages (JA 5-7)—gives point to the *Gertz* Court's analysis.

trary to the most elementary and salutary First Amendment principles. "In the realm of protected speech, the legislature is constitutionally disqualified from dictating . . . the speakers who may address a public issue." *Bellotti*, 435 U.S. at 784-785. "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source. . . ." *Id.* at 777. In particular, since the First Amendment provides an equal guarantee of freedom of speech and of the press, "the press does not have a monopoly on either the First Amendment or the ability to enlighten." *Id.* at 782; see also, *id.* at 795-802 (Burger, C.J., concurring). In the words of Justice Frankfurter:

[T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it. ". . . the liberty of the press is no greater or no less . . ." than the liberty of every citizen of the Republic. [*Pennekamp v. Florida*, 328 U.S. 331, 364 (Frankfurter, J., concurring).]<sup>5</sup>

The value of speech does not depend on whether the words are uttered by the "media" or by "non-media" citizens of the Republic; it follows that the extent of the First Amendment's protection does not depend on the speaker's identity.<sup>6</sup>

<sup>5</sup> Compare *Bridges v. California*, 314 U.S. 252, 277-279 ("[Our] observations . . . upon the timeliness and importance of utterances as emphasizing rather than diminishing the value of constitutional protection, and upon the breadth and seriousness of the censorial effects of punishing publications in the manner followed [by the courts] below, are certainly no less applicable to a leading spokesman for labor than to a powerful newspaper taking another point of view.") See also *Pell v. Procunier*, 417 U.S. 817, 833-834.

<sup>6</sup> While we believe the principle developed in the text to be dispositive, we note that Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 U.C.L.A. L. Rev. 915, 930-935 (1978), persuasively demonstrates the fallacy in the argument that

(2) The second question posed by the Court is whether the *Gertz* rule against presumed and punitive damages should apply "when the speech is of a commercial or economic nature." Order of July 5, 1984, — U.S. —, 52 L.W. 3937. It is our submission that the speech here is not "commercial speech" as this Court has defined that term and that, aside from "commercial speech," there should be no category of "speech of a commercial or economic nature" entitled to lesser First Amendment protection than other forms of speech.

(a) D&B provides its subscribers information on the financial status of business entities. The substance of D&B's reports is akin to the substance of the financial reports in *The New York Times* and *The Wall Street Journal*, or on the television program *Wall Street Week*. On its face then, D&B's speech is a part of the free interchange of information on matters of interest and concern regarding the functioning of the commercial sector of the society that the First Amendment is intended to protect.

D&B's speech has none of the earmarks of the category of speech this Court has distinguished from other speech under the rubric "commercial speech." The concept of "commercial speech" for purposes of First Amendment analysis has consistently been limited to "purely commercial advertising," *Valentine v. Chrestensen*, 316 U.S. 52, 54, and to "speech which does 'no more than propose a commercial transaction,'" *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 762 (quoting *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376, 385).

In *Chrestensen* the Court held "that the Constitution imposes no . . . restraint [based on a right of free speech] on government as respects purely commercial ad-

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"media" speech is "relatively more important" than other speech and is for that reason entitled to greater protection in defamation actions.

vertising." 316 U.S. at 54. *Virginia Pharmacy* revisited that ruling and held that commercial advertising—a phrase the Court used interchangeably with the term "commercial speech" (e.g. 425 U.S. at 772 n.24)—is entitled to First Amendment protection, albeit to a lesser degree of protection than is afforded to other forms of speech. While *Virginia Pharmacy*, in other words, did alter the rule of constitutional law governing the "commercial speech" category, that case did not alter the scope of the category in a way that narrows the speech entitled to the full degree of First Amendment protection.

Every case since *Virginia Pharmacy* in which this Court has treated speech as "commercial speech" has involved purely commercial advertising or other methods of proposing a commercial transaction.<sup>7</sup> And, the Court has continued to use the terms "commercial speech" and "purely commercial advertising" as synonymous<sup>8</sup> and

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<sup>7</sup> *Bolger v. Young Drug Products Corp.*, — U.S. —, 103 S.Ct. 2875 (advertising contraceptives); *In re R.M.J.*, 455 U.S. 191 (advertising legal services); *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (advertising on billboards); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (advertising electrical power); *Friedman v. Rogers*, 440 U.S. 1 (use of trade name in advertising optometric services); *Ohralik v. Ohio State Bar Assoc.*, 436 U.S. 447 (proposal to provide legal services for profit); *Bates v. State Bar of Arizona*, 433 U.S. 350 (advertising legal services); *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85 (advertising houses). See also, the pre-*Virginia Pharmacy* cases discussing the doctrine of commercial speech. *Bigelow v. Virginia*, 421 U.S. 809 (advertising abortions); *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376 (advertising jobs).

<sup>8</sup> E.g. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. at 563 ("The First Amendment's concern for commercial speech is based on the informational function of advertising."); *Bates v. State Bar of Arizona*, 433 U.S. at 364 ("Advertising, though entirely commercial, may often carry information of import to significant issues of the day. . . . And commercial speech serves to inform the public of the availability, nature, and prices of products and services . . .").

has repeatedly defined the concept of "commercial speech" as "speech proposing a commercial transaction."<sup>9</sup> Moreover, the rationale the Court has given for the lesser degree of protection afforded commercial speech fits only commercial advertising or other proposals for a commercial transaction, and not other kinds of speech. The Court in *Central Hudson*, 447 U.S. at 564 n.6, succinctly summarized that rationale:

In most other contexts, the First Amendment prohibits regulation based on the content of the message. *Consolidated Edison Co. v. Public Service Comm'n*, [447 U.S. 530,] 537-540. Two features of commercial speech permit regulation of its content. First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. *Bates v. State Bar of Arizona*, 433 U.S. 350, 381 (1977). In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not "particularly susceptible to being crushed by overbroad regulation." *Ibid.*

Commercial speech, then, is the speech of producers of goods and services promoting their wares. That speech is "hardy" because it is fortified by the maker's knowledge of his own product and is activated by his desire to enhance sales of that product and the attendant profits.

A comparison of *Central Hudson* and its companion case *Consolidated Edison Co.* (cited in the above-quoted passage), helps to put the foregoing in concrete terms. *Central Hudson* concerned advertising by an electric utility to "promote the use of electricity" (447 U.S. at 558), the utility's product. Those advertisements were deemed by the Court to be "commercial speech," and

<sup>9</sup> See, e.g., *Bolger*, 103 S.Ct. at 2880; *Metromedia*, 453 U.S. at 505-506; *Central Hudson*, 447 U.S. at 562; *Friedman*, 440 U.S. at 11.

analyzed accordingly. *Consolidated Edison*, concerned materials circulated by an electric utility to extol the "benefits of nuclear power" (447 U.S. at 532), a matter of the most direct economic interest to the utility. But even though *Consolidated Edison*'s ultimate objective was to enhance its profit making opportunities, the Court did *not* treat its materials as commercial speech but rather as speech entitled to full First Amendment protection. The Court explained that the speech in *Consolidated Edison* was "a direct[] comment on a public issue" while that in *Central Hudson* was "advertising 'clearly intended to promote sales'" and therefore speech "in the context of [a] commercial transaction[]." 447 U.S. at 563 n.5.<sup>10</sup> And the Court added "the failure to distinguish between commercial and noncommercial speech 'could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech.'" *Id.* quoting *Ohralik*, 436 U.S. at 456.

D&B's reports at issue here are not purely commercial advertisements for some underlying good or service or a proposal to buy or sell such a product. And, D&B, like any other reporter or commentator on financial matters, was commenting not on its own internal operations but on those of a third person as to whom D&B had no inherent knowledge. Moreover, like most reporters and commentators, D&B was activated by its desire to sell its publication not by the advertiser's desire to capitalize on its production of an underlying good or service. Thus, D&B's speech is not "commercial speech."

(b) As noted at the outset, the second question posed by the Court inquires about the relevance to proper application of the *Gertz* test of the fact that speech is "commercial or economic in nature." Aside from the "commercial speech" just discussed this Court has never

<sup>10</sup> See also, *Friedman*, 440 U.S. at 11 and n.10; *Bolger*, 103 S.Ct. at 2880-2881.

described a category of speech "of a commercial or economic nature" less deserving of First Amendment protection than other speech, and we submit that this Court's precedents leave no room for any such category.

D&B's reports are commercial and economic in nature in that the reports are prepared and published for sale at a profit, and thus for D&B's ultimate economic benefit, and in that the subject matter of the reports is the financial condition of business entities. Neither of these factors is a basis for affording the reports diminished First Amendment protection.

This Court has consistently recognized that the speaker's ultimate objective of enhancing his economic situation is not a basis for diminishing the degree of First Amendment protection afforded to his speech. Thus, in *New York Times v. Sullivan*, 376 U.S. at 266, the Court in affording full protection to that newspaper stated: "That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold." See also, e.g., *Consolidated Edison*; *Thornhill v. Alabama*, 310 U.S. 88, 102-105; *Thomas v. Collins*, 323 U.S. 516, 531-532. It therefore suffices to say that if the fact that D&B's reports are sold for profit makes those reports "economic speech" subject to a lesser degree of First Amendment protection, then *The New York Times* and *The Wall Street Journal* in their entirety would also be economic speech subject to such lesser protection.

Similarly, the fact that D&B's reports concern business finances—the other respect in which the reports are "commercial or economic in nature"—cannot be a basis for diminished First Amendment protection. To so conclude, would be to subject the financial section of *The New York Times* and most of *The Wall Street Journal* to lesser First Amendment protection than the balance of those newspapers. The same adverse consequence would be visited on publications like *Consumers Reports*, which

evaluate commercial products. But speech relating to financial or economic matters, private as well as public, is an important part of our national discourse. In a free enterprise economy such matters as the financial standing of a company or the quality of its products are of great public interest. This Court has never suggested, or countenanced, a view of the First Amendment that would afford less protection to speech on such subjects. To the contrary, in *Thornhill v. Alabama*, 310 U.S. at 102-103, the Court stated:

In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. *Hague v. C. I. O.*, 307 U.S. 496; *Schneider v. State*, 308 U.S. 147, 155, 162-63. See *Senn v. Tile Layers Union*, 301 U.S. 468, 478. It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.

See also *Thomas v. Collins*, 323 U.S. at 531-532.

What the Court said in the labor relations context applies equally to all other aspects of our commercial system. For example, the reporting of facts indicating the

impending collapse of a bank or disclosing that a particular corporation has suffered large losses or has filed a petition in bankruptcy are as important to the course of our society as the range of reporting on private individuals assuredly protected by the *Gertz* rule. There is, accordingly, no warrant for extending a lesser degree of protection to speech on commercial or economic subjects than to speech on other subjects.

(c) If, contrary to what we have argued to this point, the Court should determine that speech of a "commercial or economic nature" is subject to some lesser degree of First Amendment protection, still the *Gertz* rule against presumed and punitive damages should apply. No matter the legal characterization, D&B's reports are speech of some value under the First Amendment, see pp. 12-13 discussing *Va. Pharmacy Bd.* And, as shown at p. 8, *supra*, *Gertz* squarely rejected any test based on the nature or importance of the speech at issue. Accordingly, the fact that the state interest in permitting the recovery of such damages is not greater here than the interest the *Gertz* Court found insubstantial, see pp. 8-11, *supra*, is dispositive regardless of the label the Court determines to affix to D&B's speech.<sup>11</sup>

#### CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of the State of Vermont in this case should be reversed.

Respectfully submitted,

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<sup>11</sup> Indeed, it could be argued that the state interest in presumed or punitive damages is at its least when, as here, the plaintiff is a business corporation whose losses are measurable and provable, rather than an individual whose losses may be more intangible and less susceptible of proof.

No. 83-18-CSX  
Status: GRANTED

Title: Dun & Bradstreet, Inc., Petitioner  
v.  
Greenmoss Builders, Inc.

Docketed:  
July 8, 1983

Court: Supreme of Vermont

Counsel for petitioner: Garrett Jr., Gordon Lee

Counsel for respondent: Heilmann, Thomas F.

Entry	Date	Note	Proceedings and Orders
1	Jul 8 1983	G	Petition for writ of certiorari filed.
2	Aug 10 1983		DISTRIBUTED. September 26, 1983
3	Aug 11 1983	X	Brief of respondent Greenmoss Builders, Inc. in opposition filed.
4	Aug 15 1983		Respondent's letter noting compliance with Rule 28.1 filed.
6	Oct 3 1983		REDISTRIBUTED. October 7, 1983
8	Oct 11 1983		REDISTRIBUTED. October 14, 1983
11	Oct 19 1983		REDISTRIBUTED. October 28, 1983.
13	Oct 31 1983		REDISTRIBUTED. November 4, 1983
14	Nov 7 1983		Petition GRANTED.
15	Dec 22 1983		*****
16	Dec 22 1983		Brief of petitioner Dun & Bradstreet, Inc. filed.
17	Dec 22 1983		Joint appendix filed.
18	Jan 5 1984		Brief amicus curiae of The Washington Post filed.
19	Jan 5 1984		Record filed.
21	Jan 11 1984		Certified original records, 1 box, received.
		Order extending time to file brief of respondent on the merits until January 30, 1984.	
23	Jan 23 1984		Brief amicus curiae of Sunward Corporation filed.
24	Jan 30 1984		Brief of respondent Greenmoss Builders, Inc. filed.
25	Feb 14 1984		SET FOR ARGUMENT. Wednesday, March 21, 1984. (4th case)
26	Feb 15 1984		CIRCULATED.
27	Mar 6 1984	D	Motion of respondent for leave to file supplemental brief filed.
28	Mar 7 1984	X	Reply brief of petitioner Dun & Bradstreet, Inc. filed.
29	Mar 9 1984		DISTRIBUTED. March 16, 1984. (Motion of respondent for leave to file supplemental brief).
30	Mar 19 1984		Motion of respondent for leave to file supplemental brief DENIED.
31	Mar 21 1984		ARGUED.
32	Jul 5 1984		This case is restored to the calendar for reargument. In addition to the questions presented by the petition for writ of certiorari and previously briefed and argued, the parties are requested to brief and argue two additional questions posed by the Court.
33	Jul 5 1984		The briefing schedule on reargument is as follows: July 30, 1984 - Petitioner's brief is to be filed and served in typewritten form. Aug. 4, 1984 - Petitioner's brief must be filed and served in printed form. Aug. 24, 1984 - Respondent's brief is to be filed and served in typewritten form. Aug. 29, 1984 - Respondent's brief must be filed and served in printed form.
34	Jul 5 1984		
35	Jul 5 1984		
36	Jul 5 1984		
37	Jul 5 1984		
38	Jul 5 1984		

No. 83-18-CSX

Entry	Date	Note	Proceedings and Orders
39	Jul 30 1984		Brief amicus curiae of Information Industry Assn. filed.
40	Jul 30 1984		Lodging to accompany amicus curiae brief of Information Industry Assn. received.
41	Jul 30 1984		Brief amicus curiae of Dow Jones & Co., Inc. filed.
42	Jul 30 1984		Supplemental brief of petitioner Dun & Bradstreet, Inc. on reargument filed.
43	Aug 3 1984	G	Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae filed.
44	Aug 10 1984		SET FOR REARGUMENT. Wednesday, October 3, 1984. (1st case)
45	Aug 24 1984		Brief amicus curiae of Sunward Corporation filed.
46	Aug 24 1984		Supplemental brief of respondent Greenmoss Builders, Inc. on reargument filed.
47	Aug 27 1984		CIRCULATED.
48	Sep 14 1984	X	Reply brief of petitioner Dun & Bradstreet, Inc. on reargument filed.
49	Sep 18 1984		Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae GRANTED.
50	Oct 3 1984		REARGUED.

Office-Supreme Court, U.S.  
FILED  
JUL 30 1984  
No. 83-18  
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CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1984

DUN & BRADSTREET, INC.,  
v. *Petitioner*,

GREENMOSS BUILDERS, INC.,  
*Respondent*.

On Writ of Certiorari to the  
**Supreme Court of the State of Vermont**

**BRIEF OF INFORMATION INDUSTRY ASSOCIATION,  
AMICUS CURIAE, IN SUPPORT OF REVERSAL**

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1984

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No. 83-18

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DUN & BRADSTREET, INC.,  
*Petitioner*,  
v.

GREENMOSS BUILDERS, INC.,  
*Respondent*.

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On Writ of Certiorari to the  
**Supreme Court of the State of Vermont**

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**BRIEF OF INFORMATION INDUSTRY ASSOCIATION,  
*AMICUS CURIAE*, IN SUPPORT OF REVERSAL**

---

The Information Industry Association submits this brief as *amicus curiae* in support of Petitioner's claim that the First and Fourteenth Amendments to the Constitution prohibit the award of presumed and punitive damages absent a showing of actual malice. The parties to this action have given their written consent to the filing of this brief pursuant to Rule 36 of the Rules of this Court. Copies of the letters of consent have been filed with the clerk.

**INTEREST OF THE *AMICUS***

The Information Industry Association ("IIA") is a trade association representing approximately 300 information publishers and information service organizations,

including Petitioner. The information industry uses the traditional "media" to provide relatively general information to mass audiences;<sup>1</sup> in addition, it supplies information content to meet more specialized needs, often relying on non-traditional means of distribution.<sup>2</sup> These specialized services were referred to in the Vermont court's opinion as "non-media" offerings. The threat of uncontrolled punitive and presumed damage awards against "non-media" defendants or "speech of a commercial or economic nature" could restrict the development by IIA's members of improved means of communication and inhibit the free flow of information in our society. Accordingly, IIA has a strong interest in the constitutional principles that may be developed in this case.

IIA members are united by their interest in delivering information content to the public. Information industry companies create, distribute, and manage a wide range of information content, including news, governmental, economic and academic studies, financial and business data, and virtually any other material for which there is sufficient demand. They do so by gathering information, by identifying the relevant and significant data, by organizing them for ready access and use, and by marketing their product to people for whom it has value and significance. This information chain is labor intensive,

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<sup>1</sup> This necessarily vague definition of the "media" would include newspapers and magazines of general circulation, radio and television broadcasting, and at least some books, films and recordings.

<sup>2</sup> The "non-media" companies represented by IIA include periodical and newsletter publishers, news services, database producers, distributors and retailers, business information reporters and researchers, micropublishers, computer manufacturers, telecommunication carriers and microprinters. IIA's membership (and the industry as a whole) varies greatly in size and scope of organization, ranging from major corporations with widely diversified information interests to small companies and individuals who fulfill highly specialized information needs. A list of IIA's members is included in Appendix A, *infra*.

costly, and depends for its success on a constant striving for accuracy because the specific markets served are highly sensitive to error.

The financial reporting service offered by Petitioner is only one of many business services created and provided in essentially the same way. Other providers of financial information disseminate material on such diverse topics as data processing products, commodities markets, technical specifications, exports, court decisions, foreign securities, patents, demographics, engineering materials, and a host of other matters. Petitioner is in the very heart of the business information industry; it creates, processes and markets information on which the vitality and functioning of our economy depend. While it is one of the best known providers of business information, it uses the same means as other firms in the industry. Thus, as a producer and disseminator of information, it is indistinguishable from other firms in the field.

The information sector uses a great variety of relatively new distribution technologies—including computer databases, microfilm, data communications, electronic mail, and specialized radio techniques—as well as traditional means of distribution, such as books, magazines, newspapers, and mail. The consumers served by these services vary from individuals receiving customized research reports, through specialized audiences interested in narrowly defined subjects, to larger audiences which desire more efficient access to general information.<sup>3</sup>

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<sup>3</sup> For example, one IIA member (Occupational Health Services) offers an electronic database with comprehensive data on hazardous substances. Another (Mead Data Central's "NEXIS") provides full-text access via computer to newspapers, magazines, news wires, and general reference materials, which are also published in traditional or paper formats. Finally, The Bureau of National Affairs, Inc. (BNA) offers a daily newsletter (delivered to subscribers by mail and also published electronically) which addresses government policies affecting business.

The "non-media" services have emerged, in part, because the traditional mass media cannot satisfy all of the information needs of our society in an acceptably efficient manner. By their very nature, the mass media must screen out information that is not relevant to a large, diverse audience (i.e., they often provide information keyed to the "lowest common denominator" of their customers). Moreover, the mass media can only present information in standardized formats, and they must deliver information according to the demands and schedules of mass publication.

In contrast, the "non-media"—by taking advantage of modern technological developments in computers, communications and other areas—can create information and transmit it to those who need it more economically, more rapidly, more selectively, and more comprehensively than the mass media. For example, some IIA members make available exactly the same information content as a daily newspaper or general magazine, but in computer database form. This enables the database audience to retrieve only those items that are of particular interest, and to obtain them almost instantaneously without extensive research time.<sup>4</sup> Other IIA members supply their customers with customized studies and analyses based on specially tailored research into existing information sources. Still other IIA members give users shared access to vast data files at affordable prices through the use of computer or microprinting technologies.

The value of these specialized services to users is reflected in the size and projected growth of the information industry. According to one recent study, the U.S. information content industry (not including the broadcast media or magazine, newspaper, or book publishing) was \$13.6 billion business in 1982. A.C. Nielsen, *The Business of Information 1983* 10 (1983). Projected industry

<sup>4</sup> For instance, continuously updated information is available through selective dissemination of information ("SDI") services, which are, in essence, electronic "clipping" services.

growth is about 14 percent each year through 1987. *Id.* at 19.<sup>5</sup>

One sector of the information industry with great potential is electronic publishing, including interactive videotex. This medium allows a user to read pages of text (often with illustrations) on a computer terminal, or even on a television set or other low-cost screen when connected to a home computer. The user can choose the precise information desired at the push of a button, commanding the central computer of the electronic publisher to search its vast memory for the requested data, including information similar to that available in a general newspaper such as "news, business and financial reports, editorials, columns, sports, features, and electronic advertising." *United States v. American Telephone & Telegraph Co.*, 552 F. Supp. 131, 181 n.208 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 103 S. Ct. 1240 (1983). The computer will transmit the selected pages to the user over a variety of media (e.g., telephone lines, unused portions of television signals or cable TV channels) depending on which particular system is used. *See generally* R. Neustadt, *The Birth of Electronic Publishing* 5-24 (1982).

Because electronic publishing permits direct delivery of accurate and continuously undatable information, it has already become a \$3.2 billion business. *Business Week*, June 11, 1984, at 86. The importance of this new field to the issue at hand cannot be overstated. Indeed, many experts believe it represents the media of the future. As one author has noted:

A new mass medium is emerging in America. Until recently, mass distribution of information has been dominated by publishing and broadcasting.

<sup>5</sup> The export of information goods and services also contributes billions of dollars to the U.S. balance of trade. *See Rubin & Mapp, Selected Roles of Information Goods and Services in the U.S. National Economy*, in *Information Economics and Policy in the United States* 33 (M. Rubin ed. 1983).

Now, technology is marrying these media to spawn a new one: electronic publishing. Print-type information—text and graphics—is being distributed over electronic channels: television, radio, cable TV and telephone wires. [Since 1978,] electronic publishing has changed from futuristic fantasy into serious business. In time, this technology may change the way we create, obtain and use information.

R. Neustadt, *supra* page 5, at 1. As District Judge Harold Greene stated, "it is not at all inconceivable that electronic publishing, with its speed and convenience will eventually overshadow the more traditional media." *United States v. AT&T*, 552 F. Supp. at 184. The advent of personal computers in the home and microprocessor technology in the workplace demonstrates that new information services are already beginning to alter fundamentally the way Americans receive information content.

Notwithstanding the impressive contribution of the information sector to date, the information age has only just begun. As Judge Greene has found, "[t]he electronic publishing industry is still in its infancy." *Id.* at 182. The information industry is composed of a multiplicity of small and medium-sized firms and, in 1983, the median company had only 42 employees and total revenues of under \$700,000. Paine Webber Mitchell Hutchins Inc., *The Information Industry* 8 (1984). Moreover, many such companies are operating at a loss. *Id.* at 9. For these reasons, IIA fears that the increase in diversity of information promised by this nascent industry would be particularly vulnerable to the harsh effects of unlimited punitive and presumed damage awards. These huge judgments—often many times greater than the net worth of an average information industry company—cannot fail to have a harmful chilling effect on the free flow of information from a large number of diverse sources. Accordingly, IIA and its members have a substantial interest in this case.

#### SUMMARY OF ARGUMENT

No justification exists for the "media/non-media" distinction drawn by the lower court. Freedom of speech and the press are accorded to all citizens equally and there is no constitutional basis for giving less protection to new or different information services than that enjoyed by the traditional mass media. A large and diverse range of "non-media" companies serve the same function in our society as the mass media, making available the same or similar information content, often by identical means. The imposition of unlimited punitive and presumed damage awards on these "non-media" information companies would have the same chilling effect on protected expression as that which the Court has recognized in cases involving traditional media defendants. In addition, the threat of enormous judgments in defamation cases could severely restrict the development of new and diverse information sources.

Furthermore, the lower court erred in its conclusion that there is no constitutional value in speech outside the realm of communication dealing with political and public issues. First Amendment protection is not limited to political expression. The Constitution safeguards a broad range of speech, including discussion of social, economic, artistic, literary and ethical matters. Moreover, while the Court has afforded "commercial speech" a lesser degree of First Amendment protection than some other forms of communication, this doctrine is limited to advertising and related promotional activity. Outside the context of advertising and promotional speech, communication concerning economic and commercial affairs (like speech on other subjects) is fully susceptible to the dangers of self-censorship that could flow from the unrestricted imposition of punitive and presumed damages.

## ARGUMENT

**I. THE FIRST AND FOURTEENTH AMENDMENTS PRECLUDE THE AWARD OF PRESUMED OR PUNITIVE DAMAGES IN DEFAMATION CASES INVOLVING "NON-MEDIA" DEFENDANTS ABSENT A SHOWING OF ACTUAL MALICE.**

**A. The Constitutional Rule of *New York Times* and *Gertz* with Respect to Presumed and Punitive Damages Should Apply to All Speakers.**

Neither the language of the First Amendment nor this Court's interpretive rulings can support the view that only some classes of speakers are entitled to the protection offered defamation defendants in *New York Times* and *Gertz*. To the contrary, freedom of speech and freedom of the press are "fundamental personal rights and liberties." *Lovell v. Griffin*, 303 U.S. 444, 450 (1938) (emphasis added). See *First National Bank v. Bellotti*, 435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source . . . ."); *id.* at 802 (Burger, C.J., concurring) ("[T]he First Amendment does not 'belong' to any definable category of persons or entities: It belongs to all who exercise its freedoms.").

More specifically, the right of the mass media to generate and disseminate ideas does not differ from the freedom of the press guaranteed all citizens under the First Amendment. The Court has found that liberty of the press "is not confined to newspapers and periodicals". . . . Almost any author may quite accurately assert that he is contributing to the flow of information to the public . . . ." *Branzburg v. Hayes*, 408 U.S. 665, 704-05 (1972) (quoting *Lovell*, 303 U.S. at 452). In fact, freedom of the press is "'no greater and no less' . . . than the liberty of every citizen of the Republic." *Bellotti*, 435 U.S. at 801-02 (Burger, C.J., concurring)

(quoting *Pennekamp v. Florida*, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring)).<sup>6</sup>

Furthermore, the fact that this case involves presumed and punitive damages provides no basis for distinguishing between "media" and "non-media" speakers. Presumed and punitive damage awards were limited in *Gertz* because: (i) unbridled jury discretion over damages inhibits the exercise of First Amendment freedoms;<sup>7</sup> and (ii) the countervailing state interest in compensating victims of defamatory speech "extends no further than compensation for actual injury." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974).<sup>8</sup> The Court drew no

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<sup>6</sup> If this Court were to rule that the "media" are entitled to special treatment with respect to defamation damages, the term "media" would have to be defined to include "every sort of publication which affords a vehicle of information and opinion." *Lovell*, 303 U.S. at 452. Many information companies other than traditional publishers and broadcasters disseminate or "publish" all types of information and opinion, including financial reports. See *infra* note 13 and accompanying text.

To the extent that any form of communication was deemed to be deprived of the protection accorded the "media," the Court would continuously be required to consider in future cases the different levels of protection guaranteed by the "speech" and "press" clauses of the First Amendment. See Stewart, "Or of the Press", 26 Hastings L.J. 635 (1975). In this regard, it is significant that one of the foremost representatives of the institutional press finds no basis "for distinguishing between the established press and the lonely pamphleteer in defining the media for purposes of defamation law." Brief of The Washington Post, *Amicus Curiae*, at 22 n.4.

<sup>7</sup> See also *Smith v. Wade*, 103 S. Ct. 1625, 1641-44 (1983) (Rehnquist, J., dissenting) ("punitive damages [have] been vigorously criticized throughout the Nation's history"); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82-87 (1971) (Marshall, J., dissenting) (size of punitive judgments could be "fatal" to publishers).

<sup>8</sup> Contrary to Respondent's claim, a decision for Petitioner would not sound the "death knell of reputational interests of our citizenry." Brief of Respondent at 12. To the contrary, the issue here is a narrow one—whether the states have a legitimate interest in

distinction among types of speakers in *Gertz* and the justifications provided for the limitations on state remedies logically apply with equal force to all speakers.

**B. The Lower Court's "Media/Non-Media" Distinction Is Unsound.**

Even assuming *arguendo* that a principled reason exists for exposing some, but not all, defamation defendants to uncontrolled liability for presumed and punitive damages, the distinction selected by the Vermont Supreme Court is indefensible. It is difficult to discern the court's rationale for singling out "non-media" entities for lesser protection; indeed, the court did not even offer a definition of "non-media" defendants in its opinion. However, the court apparently assumed that "non-media" companies are distinguishable because they sell specialized information at high prices to "selective, finite audience(s)." *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 461 A.2d 414, 417-18 (Vt.), cert. granted, 104 S. Ct. 389 (1983), *request for rebriefing*, 104 S. Ct. 1586 (1984).<sup>9</sup>

The information sector, however, is not so easily classified. In fact, there is a wide variety of information companies in today's marketplace (including the traditional press), all of which perform interrelated functions. As demonstrated below, sound distinctions cannot be drawn between these companies based on the fact that their target audiences may be specialized. Furthermore,

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guaranteeing defamation plaintiffs judgments in excess of that necessary to compensate them for actual, proven injuries. While there may be a role for the states in securing reputational interests to the extent of actual injury, the First Amendment was crafted expressly to forbid governmental punishment of expression. As demonstrated below, inhibition of "non-media" speakers is just as damaging to First Amendment goals as is the inhibition of the traditional mass media.

<sup>9</sup> Confusingly, at one point in its opinion, the Vermont court characterized credit agencies as a "type of media." 461 A.2d at 417.

any attempt to draw a line between the traditional media and "non-media" companies would be undermined by the fact that the various speakers use the same means of distributing information content.

**1. The Provision of Service to Specialized Audiences Should Not Deprive "Non-Media" Companies of First Amendment Protections.**

— A "non-media" company should not be penalized simply because it serves a relatively small audience that is willing to pay substantial sums for what often is highly specialized information.<sup>10</sup> While advertising revenues are sufficient to support services for which there is truly a mass market, premium subscription charges may be the only means of financing the production and dissemination of materials that are customized to meet the needs and interests of smaller audiences. In such circumstances, these subscription arrangements directly advance the First Amendment goals of broadening, diversifying and enriching the flow of information to the American people.

The Vermont court's assumption that "non-media" speech may be distinguished on the ground that it is delivered only to select, finite audiences is unfounded. In fact, the audience reach of any given "non-media" service (especially those delivered electronically) is potentially greater than that of many traditional publications. For example, the "Dow Jones News/Retrieval" service is available to 120,000 subscribers, while *American Opinion*, the publication at issue in the *Gertz* case, has a current circulation of 40,000. See IDP Report, February 17,

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<sup>10</sup> It is well established that the mere fact that a speaker receives pecuniary compensation does not remove the speech from the ambit of the First Amendment. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952).

1984, at 3; IMS, *Ayer Directory of Publications* 470 (1984).<sup>11</sup>

Even to the extent that "non-media" entities provide services that are inherently more specialized or customized than the traditional media, this would not justify the denial of constitutional protection to "non-media" speech. At the time the Bill of Rights was adopted, there was no "mass" media as we know it today. The First Amendment has been properly interpreted to afford equivalent protection to publications ranging from *The New York Times* with a daily circulation of 900,000 in its 133rd year (see *New York Times Co. v. United States*, 403 U.S. 713 (1971)) to "an occasional publication (nine issues) more nearly approximating the product of a pamphleteer than the traditional newspaper." *Bellotti*, 435 U.S. at 801 n.6 (Burger, C.J., concurring) (discussing *Near v. Minnesota*, 283 U.S. 697 (1931)). In short, the mere size of the audience has never defined the appropriate level of First Amendment protection.<sup>12</sup>

## 2. First Amendment Protection for Speech Should Not Depend on Use of Traditional Means of Distributing Information Content.

No justification exists for granting information companies different degrees of protection against unlimited punitive and presumed damage awards based on whether they use conventional publishing or alternative, non-traditional means to distribute information content. Reports of the alleged bankruptcy of Greenmoss Builders

<sup>11</sup> Furthermore, even the traditional media are increasingly gearing their publications to more specialized audiences as evidenced by the trend toward specialty magazines. See *Advertising Age*, Mar. 26, 1984, at M-16.

<sup>12</sup> Removing First Amendment protection from publications with small circulations carries with it the danger of suppressing unpopular minority opinions. Cf. *Edwards v. South Carolina*, 372 U.S. 229, 237-38 (1963).

could have been published in Vermont newspapers, which clearly would have received protection under the *Gertz* rule. Dun & Bradstreet performed the same communicative function and, thus, deserves the same treatment.

Furthermore, it is becoming increasingly common for identical copy to be available through more than one distribution mechanism. For example, Dun & Bradstreet uses both regular mail and electronic delivery systems for the services involved in this case. In addition, the full text of many traditional publications is now provided electronically.<sup>13</sup>

In *Gertz*, this Court established an "equitable boundary" between competing concerns that limited defamation liability to the proven, actual harm. *Gertz*, 418 U.S. at 347-48. It would be entirely unreasonable to safeguard

<sup>13</sup> Many other IIA member firms compile and distribute general news and public interest information. Perhaps the best known of these services is "NEXIS," which republishes over 60 newspapers, magazines and newsletters (including *The New York Times*, *The Washington Post*, *Time* and *Newsweek*) and currently has 250,000 active users.

With respect to any given subject of expression, there are often both traditional media and "non-media" companies that provide analogous service. For example, Dow Jones & Co. offers an electronic service called "Dow Jones News/Retrieval" that is similar in content to a newspaper's business section. Companies such as Auerbach Publishers, Inc. and Datapro Research Corporation distribute product reviews of electronic equipment—not unlike fully protected product reviews that appear in a newspaper or in *Consumer Reports*. See *Bose Corp. v. Consumers Union*, 104 S. Ct. 1949 (1984).

The information industry also contains companies that list information concerning products and services. For example, Fisher-Stevens' "Physicians' Practice Profile" contains information concerning the prescribing and practice characteristics of 170,000 physicians. At least one court has already held that such information falls within the definition of the constitutionally protected "press." *Health Systems Agency v. Virginia St. Bd. of Medicine*, 424 F. Supp. 267, 272 (E.D. Va. 1976) (directory of factual information about area physicians).

information content when distributed in newsprint form, but to remove *Gertz* protection when the same material is delivered in a non-traditional manner. Much of the traditional publishing industry may "go electronic" within the next few years. *See Presstime*, April 1983, at 16. Obviously, it would be disastrous if the entire body of constitutional protections now afforded defamation defendants were to evaporate with advances in technology.

**C. The Threat of Presumed and Punitive Damage Awards Would Limit the Diversity of Information Sources and Inhibit Improvements in Communication Within Our Society.**

By subjecting the information industry to potentially huge damage liabilities, affirmance in this case would result in a reduction in the number of information suppliers which, in turn, would inevitably reduce the volume and scope of information available to the public. Moreover, any "media/non-media" distinction could be expected to inhibit the development of technologies designed to facilitate the free flow of information in our society. This constriction of diversity is fundamentally at odds with the First Amendment.

The recent proclivity toward huge jury awards is well known. It represents only the most recent evidence of the inadvisability of non-compensatory and uncontrollable punitive damages. In its earlier brief in the instant case, *The Washington Post* fully documents massive damages awarded against libel defendants. *See Brief of The Washington Post* at 12-16. A ruling for Respondent in the instant case would be an open invitation to bring such libel actions against the information industry.

Even more than many traditional media companies, the "non-media" information industry is ill-suited to bear such judgments. In this nascent field, the median information company has annual revenues of \$685,000, and is operating at a loss of nearly \$200,000 per year. *Paine Webber, supra* p. 6, at 8. Accordingly, judgments

running into the millions of dollars (as discussed by *The Washington Post*)—or even the \$350,000 presumed and punitive damages at issue here—might bankrupt the median firm in today's information industry. The novel nature of many of these ventures, coupled with untested market conditions, creates substantial inherent risks for potential entrants. These existing risks would be seriously exacerbated by a threat of unlimited punitive and presumed damage judgments.

For these reasons, the imposition of liability absent actual malice for punitive and presumed damages would inevitably reduce the diversity of information sources and, thus, of information content. Yet a key goal of the First Amendment is to promote "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). *Accord FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978). *See also United States v. AT&T*, 552 F. Supp. at 180-86. Thus, potentially unlimited exposure to excessive and destructive damage awards violates a central purpose of the First Amendment.

Moreover, restrictions based on the manner in which information is distributed would tend to inhibit the development of information technology. For example, the trend toward electronic publishing—which is fueled in large measure by an ability to update information rapidly and continuously—could be severely affected if non-traditional publishers were required to subject vast quantities of information to artificially induced and excessive verification procedures:

Unlike most products and services, information in general and news in particular are by definition especially sensitive to even small impediments or delays. Information is only valuable if it is timely; by and large it is virtually worthless if its dissemination is delayed. This quality is especially impor-

tant in electronic publishing because up-to-date information and constant availability are the features likely to be sought by subscribers.

*United States v. AT&T*, 552 F. Supp. at 182.

In sum, a reduction in the number of information sources and delivery methods would be the inevitable result of the Vermont court's decision. This, in turn, would chill protected expression, and deny to the marketplace of ideas the full benefits of the information sector. Because the First Amendment demands greater protection for expression, the decision below must be reversed.

**II. THE MERE FACT THAT SPEECH INVOLVES COMMERCIAL OR ECONOMIC INFORMATION DOES NOT DEPRIVE THE SPEAKER OF FIRST AMENDMENT PROTECTION AGAINST THE UNRESTRICTED IMPOSITION OF PRESUMED OR PUNITIVE DAMAGES.**

**A. The First Amendment Protects a Wide Range of Expression, Including Speech Related to Commerce and Economics.**

Although not precisely articulated, the Vermont court appeared to affirm the award of punitive and presumed damages in this case on the ground that the type of speech involved is unrelated to politics or public issues and, therefore, is not cognizable under the First Amendment. However, the First Amendment clearly protects a broad variety of speech outside the political realm.

Freedom of expression undoubtedly has social utility in contributing to the vitality of the self-governing process. However, it is also recognized that "[t]he First Amendment presupposes that the freedom to speak one's mind is . . . an aspect of individual liberty—and thus a good unto itself . . ." *Bose Corporation v. Consumers Union*, 104 S. Ct. 1949, 1961 (1984). Thus, even though particular attention is sometimes devoted to political speech,

this Court has long acknowledged that the protections of the First Amendment are not limited to political expression:

It is no doubt true that a central purpose of the First Amendment 'was to protect the free discussion of governmental affairs.' . . . But our cases have never suggested that expression about *philosophical, social, artistic, economic, literary, or ethical matters* —to take a nonexhaustive list of labels—is not entitled to full First Amendment protection.

*Abood v. Detroit Board of Education*, 431 U.S. 209, 231 (1977) (citations omitted) (emphasis added). See also *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).<sup>14</sup> Indeed, this Court has declared that:

Freedom of discussion, if it would fulfill its historic function in this nation, must embrace *all* issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

*Thornhill v. Alabama*, 310 U.S. 88, 102 (1940) (emphasis added).

Significantly, this Court has specifically affirmed that the freedom to speak or publish extends to words or writings concerning economics and commerce. In *Thornhill*, the Court recognized the First Amendment importance of "[f]ree discussion concerning the conditions of industry and the causes of labor disputes . . ." *Id.* at 103. See also *Thomas v. Collins*, 323 U.S. 516, 531 (1945). More recently, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), this Court found First Amendment protections

<sup>14</sup> Significantly, the Framers viewed freedom of expression as a concept that extends well beyond political information and encompasses "the advancement of truth, science, morality, and the arts in general . . ." 1 *Journals of the Continental Congress 1774-1789* 108 (W. Ford ed. 1904), quoted in *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

to apply in a broader commercial context. Recognizing that an individual's interest in commercial information "may be as keen, if not keener by far, than his interest in the day's most urgent political debate," the Court found that:

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. . . . And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

*Id.* at 763, 765 (citations and footnotes omitted).<sup>15</sup>

Furthermore, any attempt to differentiate between information industry companies on the basis of the content of their speech would harken back to the type of subjective, case-by-case adjudication of defamation actions that was required under *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).<sup>16</sup> The Court in *Gertz* discarded the *Rosenbloom* "newsworthiness" test because of the

<sup>15</sup> See also *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561-62 (1980) ("Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information").

<sup>16</sup> Because content-based distinctions could lead to the suppression of unpopular—albeit valuable—speech, the Court generally insists that the protections of the First Amendment are content neutral. *Regan v. Time, Inc.*, 52 U.S.L.W. 5084, 5087 (U.S. July 3, 1984) ("Regulations which permit the Government to discriminate

difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not—to determine . . . 'what information is relevant to self-government.' . . . We doubt the wisdom of committing this task to the conscience of judges.

*Gertz*, 418 U.S. at 346 (quoting *Rosenbloom*, 403 U.S. at 79). Moreover, it is the role of the marketplace of ideas, not the judiciary, to identify truth and value in classes of expression. As stated by Justice Douglas: "[I]f the rough and tumble of debate is the best vehicle for producing approximations of factual truth or preferred opinion, then courts have no business making premature and interim evaluations of contested statements' merits." *Dun & Bradstreet, Inc. v. Grove*, 404 U.S. 898, 903 (1971) (Douglas, J., dissenting).

The type of information provided by IIA members includes, *inter alia*, precisely the sort of economic and commercial information that has been recognized by this Court to be subject to First Amendment protection. To burden this speech discriminatorily with the risk of unlimited punitive and presumed damage awards would violate the First Amendment rights of IIA members and other firms in the information industry.

**B. The Stringent Forms of Content Regulation that Are Imposed on Commercial Advertising Are Not Applicable to the Dissemination of Economic Information Outside of Advertising or Related Promotional Activity.**

Although this Court has accorded "commercial speech" a lesser degree of First Amendment protection than that enjoyed by other forms of communication, it is recognized that this reduced level of protection is not applicable to all speech concerning commercial or economic matters.

on the basis of content be tolerated under the First Amendment"). See also *Bose*, 104 S. Ct. at 1962; *Police Dep't v. Mosley*, 408 U.S. 92 (1972).

Indeed, the dichotomy recognized by the Court is based on "commonsense differences between speech that does 'no more than propose a commercial transaction' . . . and other varieties." *Virginia Pharmacy*, 425 U.S. at 771 n.24 (citation omitted).

Thus, while some advertising and related promotional material may be singled out for special regulatory treatment, the Court has never suggested that the publication of information about economic institutions or activity would generally (*i.e.*, outside of an advertising or promotional context) be subject to such harsh treatment.<sup>17</sup> This is true regardless of whether the reporting or dissemination of such information occurs through the columns of *The Wall Street Journal*, product reviews offered by *Consumer Reports*,<sup>18</sup> or electronic transmissions of business and commercial material from a computer database.

<sup>17</sup> Even if the special restrictions on commercial speech were applicable to all "expression related solely to the economic interests of the speaker and its audience," *Central Hudson*, 447 U.S. at 561, these restrictions would not logically apply to reporting on the activities of a business corporation by a third-party enterprise (traditional or non-traditional) seeking to provide information to its subscribers. Indeed, the speech here has no more relation to the economic interests of Petitioner than the information in the news columns of *The Washington Post* or *Wall Street Journal* has to the economic interests of the publishers of those newspapers.

Examination focused on the speaker's direct economic interests would not void all regulation of economic activity. To the contrary, for example, the offering of securities or corporate proxy statements represents expression in the direct economic interest of the speaker, and may be afforded reduced First Amendment protection. *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

<sup>18</sup> *See Bose Corp. v. Consumers Union*, 104 S. Ct. 1949 (1984) (apparently assuming that reviews of products in *Consumer Reports* is speech entitled to protection from liability absent actual malice). Indeed, the *Bose* Court must have assumed that product reviews about stereophonic speakers were within First Amendment protections. IIA sees little difference between the speech about speakers there and the speech about building contractors at issue here.

The fact that the commercial speech doctrine is limited to advertising and promotional activities is underscored when one examines the specific factors that the Court has used to justify carving out a category of speech with limited protection. The "commonsense differences" which were used to distinguish advertising from "other varieties" of speech included its verifiability and its hardiness. Specifically, the Court noted that:

The truth of commercial speech . . . may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely.

*Virginia Pharmacy*, 425 U.S. at 771 n.24. While these considerations may be applicable to advertising by a company seeking to sell a product or service, they self-evidently are *not* applicable to the collection, processing and dissemination of economic information by either the traditional mass media or the "non-media."

Furthermore, while some may suggest that advertising can be distinguished by the presence of a tendency to misrepresent, the overriding incentive of the media (either traditional or non-traditional) in reporting on economic or business matters is to develop a reputation for accuracy and reliability. While misstatements of fact can and do occur, there is no basis for assuming that a general disposition to deceive is at the root of the problem. Instead, the obvious "culprit" here, as in other areas of speech, is human error.

The entire body of constitutional law of defamation is premised directly on a recognition that "erroneous state-

ment is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive' . . . ." *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964). While the special characteristics of advertising may suggest that such a form of speech would survive, or even prosper, without "breathing space," there is no basis for concluding that this is the case with all forms of communication concerning commercial, business and economic affairs. Indeed, these subjects cannot be distinguished on a principled basis from others—such as politics, art, literature and social mores—that are entitled to a full measure of First Amendment protection.

The inevitable result of underinclusive application of First Amendment protections would be to threaten many "non-media" companies that provide economic information to subscribers, but are simply incapable of shouldering the burden of huge presumed and punitive damages. As noted above, the average information company is quite different from a media conglomerate, and far too small to withstand the type of punitive damage awards that are becoming common in defamation actions. In the interest of self-preservation, information companies probably would adopt an excessively cautious approach to the selection and verification of information to be distributed. It was precisely this type of self-censorship that the Court found intolerable in *New York Times* and *Gertz*. See *Gertz*, 418 U.S. at 340. The threat of severe punishment for error disseminated without actual malice "runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press." *Id.* The Court has already indicated that it is not willing to run that risk. The First Amendment "requires that we protect some falsehood in order to protect speech that matters." *Id.* at 341. In this case, the only protection for falsehood that is sought is to limit damages, in the absence of actual malice, to those actually incurred and proven by plaintiffs.

#### CONCLUSION

Based on the foregoing, the Information Industry Association, *amicus curiae*, respectfully urges the Court to reverse the judgment of the Vermont Supreme Court and to remand the decision for retrial.

Respectfully submitted,

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July 30, 1984

## **APPENDIX**

**APPENDIX A**

**Information Industry Association Members \***

ABC-Clio Information Services  
Academic Press  
Access Innovations, Inc.  
ADMAX  
ADP Network Services Database Services  
AgriData Network  
All America Cables and Radio, Inc. (ITT)  
Alpha Systems Resource  
American Banker  
American Express Interactive Services  
American Express Service Establishment Expansion  
American International Data Search  
Analysis Technology, Inc.  
ARTICULATE  
Aspen Systems Corporation  
AT&T Communications  
AT&T Corporation  
AT&T Information Systems Division  
Auerbach Publishers, Inc. (Int'l Thom)  
AutEx Systems (Xerox)  
base-line SYSTEMS Corporation  
Berul Associates, Limited  
The Berwick Group  
Bibliographic Retrieval Services (ITG)  
Bio Medical Information (SFN)  
BioSciences Information Service  
The Bob Birnbaum Company  
BNA Database Publishing Unit (BNA)  
BNA Video Group (BNA)  
BNA's Research & Special Projects Div. (BNA)  
Bobbs-Merrill (ITT)

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\* For a description of the information services offered by these companies, see *Information Industry Association, Information Sources 1984* (1984).

**A2**

R.R. Bowker Company (Xerox)  
Bowne & Company  
Broadcast Advertisers Reports (SFN)  
BUC Information Services  
The Bureau of National Affairs, Inc.  
Burrelle's Information Search Service  
Business International Corporation  
Callaghan & Company (Int'l Thom)  
Cambridge Research Institute  
Cambridge Scientific Abstracts (Disclosure)  
Capitol Services, Inc. (ITG)  
Carrollton Press, Inc. (Int'l Thom)  
Chase Econometrics/IDC  
The Chronicle of Higher Education  
Citishare Information Services  
Clark Boardman Company Ltd. (Int'l Thom)  
C.N.R.S. Centre de Doc. Sci. et Technique  
COADE (Int'l Thom)  
Commodity News Services, Inc. (K-R)  
Compusearch Market & Social Research Ltd.  
Congressional Information Service, Inc. (Elsevier)  
Cordatum Inc.  
Cordura Publications, Inc.  
Creative Strategies International (Bus. Int'l)  
Credit Bureau (Equifax)  
Cuadra Associates  
Cultural Services, Inc.  
D & B Computing Services (D&B)  
DATA BASE USER SERVICE  
Data Courier Inc.  
Data-Ease  
Data Resources, Inc. (McGraw-Hill)  
Database (Hong Kong)  
Database Services  
Datapro Research Corp. (McGraw-Hill)  
Dataquest (Nielsen)  
Datasolve Database Information Service

**A3**

Derwent, Inc.  
Dialcom International, Inc. (ITT)  
DIALOG Information Services, Inc.  
Directory (SNET)  
Disclosure Incorporated  
F.W. Dodge Division (McGraw-Hill)  
Donnelley Marketing (D&B)  
Dow Jones & Company, Inc.  
Dowden Communications  
Dun & Bradstreet Canada Limited (D&B)  
The Dun & Bradstreet Corporation  
Dun & Bradstreet Credit Services (D&B)  
Dun & Bradstreet International (D&B)  
Dun & Bradstreet Operations (D&B)  
Dun's Marketing Services (D&B)  
DunsNet (D&B)  
The Economist Publications & Data Services, USA  
EIC/Intelligence Inc.  
Elsevier Publishing (Elsevier)  
Elsevier U. S. Holdings, Inc.  
Equatorial Communication Services  
Equifax Ctr for Info. Research (Equifax)  
Equifax Inc.  
Ergosyst Associates, Inc.  
Excerpta Medica (Elsevier)  
Exporters Encyclopaedia (D&B)  
EXSHARE, Extel Computing Limited  
Faxon Network Services  
FIND/SVP  
Fisher-Stevens, Inc. (BNA)  
Focus Research Systems, Inc. (D&B)  
France Telecom Inc.  
Frost & Sullivan, Inc.  
Gale Research Company  
Gartner Group  
Gateway Systems Inc.  
Global Engineering Documents (ITG)

**A4**

Government Counselling Ltd.  
Greenwood Press (Elsevier)  
Gregg Corporation  
Grolier Electronic Publishing, Inc.  
Group L Corporation  
GTE Telenet Comm. Network Applications  
  
G.K. Hall (ITT)  
Haney Group, Inc.  
Harris Information Services  
Harte-Hanks Interactive Services  
Healthcare Info. Services Div. (McGraw-Hill)  
Houghton-Mifflin Reference Div.  
  
ICOR Information Systems  
INACOM International (Int'l Thom)  
Info Globe  
Informatics Information Systems & Services  
Information Access Company (Ziff-Davis)  
Information Consultants, Inc.  
Information Handling Services (ITG)  
Information Industries Ltd. (ITG)  
Information Market Indicators  
Information Marketing International (Ziff)  
Information on Demand, Inc.  
Information Researchers, Inc.  
The Information Store  
INFOSOURCE, Inc.  
INMAGIC INC  
Institute for Scientific Information  
InterDigital, Incorporated  
International Business Machines Corporation  
International Data Corporation  
International Development Center  
International Thomson Business Press, Inc.  
International Thomson Holdings  
International Thomson Information Inc.  
Intertec (ITG)  
ITG, Inc.

**A5**

ITG, Inc., International Division  
ITT Communications and Info. Services, Inc.  
ITT Educational Services  
ITT Publishing  
ITT World Communications Inc.  
ITT World Directories  
  
Kalba Bowen Associates Inc.  
KEYCOM Electronic Publishing  
KLUWER  
  
LaserData, Inc.  
Learned Information, Inc.  
Legi-Slate (Washington Post)  
The Lifestyle Selector (Nat'l Demographics)  
LINC Resources Inc.  
LINK Resources Corporation (Int'l Data)  
Longman Inc.  
Rufus S. Lusk & Son, Inc.  
  
Management Contents (Ziff)  
Maritime Data Network, Ltd.  
Market Information Inc.  
Marquis Who's Who Inc. (ITT)  
McGraw-Hill Book Company  
McGraw-Hill Broadcasting Company, Inc.  
McGraw-Hill, Inc.  
McGraw-Hill Information Systems Company  
McGraw-Hill International Book Company  
McGraw-Hill Publications Company  
Mead Data Central  
Meckler Publishing  
Media General, Inc.  
MEKAN Information Analysis Center  
Menlo Corporation  
Meredith Corporation  
Metrics Research Corporation  
Michie Company (ITT)  
MindScape, Inc. (SFN)  
MIW Associates

Mnemos  
 Modern Imaging  
 Moody's Investors Service (D&B)  
 Moore Data Management Services  
 MultiList Inc. (Real Estate Data)  
 National Decision Systems  
 National Demographics Ltd.  
 National Management Systems  
 National Planning Data Corporation  
 National Standards Assoc. (Disclosure)  
 NDX Corporation  
 NERAC  
 Network Marketing (SNET)  
 The New York Law Publishing Company (SFN)  
 The New York Times Syndicated Sales  
 Newport Associates  
 NewsBank, Inc.  
 Newsday Videotex Services (Times Mirror)  
 NewsNet, Inc.  
 Newsweek (Washington Post)  
 Nielsen Business Services  
 Occupational Health Services  
 Ohio Real Estate Services, Inc.  
 One Point Inc./Int'l Telemarketing  
 The Oryx Press  
 PageAmerica Group, Inc.  
 Participation Systems Incorporated  
 Pergamon International Information Corp.  
 Petroleum Information (Nielsen)  
 Pharmaco-Medical Documentation  
 Phillips Publishing Publications Group  
 Port Import/Export Reporting Service (K-R)  
 Post-Newsweek Stations (Washington Post)  
 Predicasts (ITG)  
 Prentice-Hall, Inc.  
 PsycINFO

Questel, Inc.  
 Quotron Systems, Inc.  
 Readex Microprint (NewsBank)  
 Real Estate Data, Inc.  
 Reed Telepublishing  
 Reference Technology Inc.  
 Research One  
 Research & Review Service of America (ITT)  
 Research Publications (Int'l Thom)  
 RFP, Inc.  
 Howard W. Sams Company (ITT)  
 Sanoma-International  
 Scott, Foresman and Company (SFN)  
 SDC Information Services  
 Seibt Verlag GmbH (ITG)  
 SFN Companies, Inc.  
 I.P. Sharp Associates  
 Shepard's (McGraw-Hill)  
 Silver Burdett Company (SFN)  
 Sogitec Incorporated  
 Solution Associates, Inc.  
 SONECOR Systems (SNET)  
 Source Telecomputing Corporation  
 South-Western Publishing Company (SFN)  
 Southern New England Telephone (SNET)  
 SPNB California Databank  
 SRDS Media Plan Management Services  
 Standard & Poor's Corporation (McGraw-Hill)  
 States News Service  
 Storage Research Pty, Ltd.  
 Strategic Information (Ziff)  
 Sweet's Division (McGraw-Hill)  
 Tax Management, Incorporated (BNA)  
 Technical Indexes Ltd. (ITG)  
 Technical Insights, Inc.  
 Telerate Systems Incorporated  
 Telesensory Systems Enabling Technology Group

**A8**

Texas Instruments Incorporated  
Thomas Register of American Manufacturers  
Thomson & Thomson (Int'l Thom)  
Tijl Datapress b.v.  
Time Magazine Group  
Times Mirror Videotex Services (Times Mirror)  
Times On-Line Services, Inc. (NY Times)  
TRINET  
TRINTEX—A CBS/IBM/Sears Co.  
TRW Information Services Division  
UNIPUB (Xerox)  
University Microfilms Int'l (Xerox)  
University Park Press (SFN)  
U.S. Transmission Systems, Inc. (ITT)  
USACO Corporation  
Van Nostrand Reinhold Company, Inc. (Int'l Thom)  
Veronis, Suhler & Associates Inc.  
VideoLog Communications  
Viewdata Corporation of America, Inc. (K-R)  
VNU Amvest, Incorporated  
VU/TEXT Information Services, Inc. (K-R)  
Warner-Eddison Associates, Inc.  
The Washington Post Company  
West Indies Advertising Company, Inc.  
Western Union FYI News Service  
WESTLAW  
John Wiley & Sons, Inc.  
H. Donald Wilson Inc.  
Xerox Computer Services  
Xerox Information Resources Group  
Year Book Medical Publishers, Inc. (Times Mirror)

JUL 30 1984

ALEXANDER L. STEVAS,  
CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1983

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DUN & BRADSTREET, INC.,

*Petitioner,*

—against—

GREENMOSS BUILDERS, INC.,

*Respondent.*

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**BRIEF OF DOW JONES & COMPANY, INC. AS  
AMICUS CURIAE, IN SUPPORT OF PETITIONER**

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1983  
**No. 83-18**

---

DUN & BRADSTREET, INC.,

*Petitioner,*

—against—

GREENMOSS BUILDERS, INC.,

*Respondent.*

---

**BRIEF OF DOW JONES & COMPANY, INC. AS  
*AMICUS CURIAE*, IN SUPPORT OF PETITIONER**

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Dow Jones & Company, Inc. ("Dow Jones") respectfully submits this brief as *amicus curiae* in support of petitioner's claim that the libel judgment against it for presumed and punitive damages violates the First and Fourteenth Amendments to the Constitution. Pursuant to Rule 36.2 of the Rules of this Court, the parties to this case have given their written consent to the filing of this brief. Copies of the letters of consent have been filed with the Clerk.

**INTEREST OF THE AMICUS**

Dow Jones is engaged in a variety of enterprises to gather and disseminate news, opinion and information. It publishes *The Wall Street Journal*, a daily newspaper distributed nationally with separate editions in Europe and Asia, which

emphasizes economic, financial and commercial news and information, and also reports political and general interest news, commentary and opinion. *The Wall Street Journal* has the largest circulation of any daily newspaper in the United States. Dow Jones is also the publisher of *Barron's National Business and Financial Weekly*, a publication containing facts and opinions of particular interest to investors. Through subsidiaries, Dow Jones publishes twenty-two regional and local newspapers in many sections of the country, and books, primarily on economic, business and financial topics.

Dow Jones is also involved in dissemination of information through a variety of electronic means. The Dow Jones News Service, frequently called the "Dow Jones ticker" or the "broad tape," electronically distributes to its subscribers up-to-the-minute reports of stock information, corporate developments (including bankruptcies), national and international business highlights, and other news of interest to its subscribers. The information disseminated by the News Service is generated in large part by reporters for *The Wall Street Journal*, but the News Service also has its own staff of reporters who obtain information directly from corporations and other sources; the information distributed on the News Service is edited by the News Service's own editorial staff. Subscribers to the Dow Jones News Service have the options, among others, either of obtaining their own "hard copy" of the Service on a printer leased by Dow Jones, or of receiving the News Service on a television-like cathode ray tube monitor available from several independent companies that facilitate the transmission of electronic information.

The Dow Jones News/Retrieval Service provides its subscribers, for a fee, with access to twenty-eight information data bases. At present, one data base consists of information that has appeared in *The Wall Street Journal* or *Barron's* or has been transmitted over the Dow Jones News Service during the previous 90 days. The News/Retrieval Service permits its subscribers to search the data bases for information responsive to the subscribers' requests and to retrieve that information, either in print form or on a cathode ray tube monitor.

Because of its involvement in many forms of news and information dissemination, and because of its actual and potential exposure to libel litigation in which punitive and presumed damages are sought, Dow Jones has a profound interest in the questions before the Court in this case. This Brief will focus on the two questions posed in the Court's order of July 5, 1984, restoring this case to the calendar for reargument.

#### **SUMMARY OF ARGUMENT**

In its order of July 5, 1984, the Court asked the parties to address the questions whether "in a defamation action, the constitutional rule of *New York Times* and *Gertz* with respect to presumed and punitive damages should apply where the suit is against a non-media defendant" and "where the speech is of a commercial or economic nature?" *Amicus* submits that the answer to each question is emphatically in the affirmative.

This Court has already rejected the proposition that different categories of speakers receive different degrees of protection under the First Amendment simply because of their status. There is thus no reason or justification to apply a different First Amendment analysis merely because the defendant in a defamation action is considered "media" or "non-media." Moreover, the distinction between "media" and "non-media," in the defamation context, is becoming daily more difficult to draw. Companies such as Dow Jones are no longer limited to the traditional print media, but are increasingly involved in electronic forms of communication that are interactive, multi-functional and extraordinarily diverse. The Court should not hinge critical constitutional protections in the libel field, such as the *Gertz* rule on presumed and punitive damages, on present-day perceptions of what constitutes "the media," for those perceptions—and any bright line of demarcation between "media" and "non-media"—will inevitably become obsolete.

On the second question, speech “of a commercial or economic nature” is entitled to the full protection of the First and Fourteenth Amendments, including the protections articulated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). This Court has rejected the proposition that the freedoms of speech and of the press apply differently when the subject matter of the speech involved happens to concern “economic” or “commercial” topics. While the Court has developed a special analysis for so-called “commercial speech,” holding that such speech is entitled to a lesser degree of First Amendment protection than other expression, it has been careful to define “commercial speech” to be something different from (and far more limited than) speech about commerce.

“Commercial speech,” in the sense used by the Court to describe speech in the less-protected category, is limited to “speech proposing a commercial transaction,” *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456 (1978), or speech that “does ‘no more than propose a commercial transaction.’” *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976), quoting *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 385 (1973). The communication involved in this case—a “special notice” sent by Dun & Bradstreet to five of its subscribers reporting (incorrectly, as it turned out) respondent’s bankruptcy—was in no sense “speech proposing a commercial transaction,” nor did its content relate in any way to any business or activity in which Dun & Bradstreet itself had an interest. It was nothing more than a transmission of information from a publisher of information to readers with an interest in receiving the information. The limited protection of the commercial speech cases does not apply, and should not be extended to apply, to informational communication. Such expression should receive full First Amendment protection irrespective of the “nature” of the speech.

In any event, the “commercial speech” decisions of this Court—and the reasoning and tests articulated in those deci-

sions—are inapplicable to a defamation case such as this. The commercial speech cases have dealt with regulatory efforts by federal, state or local agencies to ban, restrict or regulate economic activity. The doctrine was developed because new rules were necessary to limit the states’ otherwise unquestioned right to regulate commercial and economic affairs when doing so affected activity that consisted (in whole or in part) of speech. But the “commercial speech doctrine” has never been applied by this Court in a defamation action.

More importantly, the analysis employed by the Court in the commercial speech cases is singularly inappropriate and unhelpful in determining the limits imposed by the First and Fourteenth Amendments on defamation suits in general, and on presumed or punitive damages in particular. Rather, the proper balancing of the legitimate interests of a defamation plaintiff with the values protected by the First and Fourteenth Amendments was established more than a decade ago by the Court in *Gertz v. Robert Welch, Inc.*, *supra*, 418 U.S. 323. The commercial speech decisions do not limit, or even apply to, the *Gertz* rule.

Finally, Dow Jones joins in the argument of fellow *amicus* *The Washington Post* that the award of presumed or punitive damages in a defamation action constitutes a profound threat to free expression and therefore violates the First and Fourteenth Amendments irrespective of whether a jury finds the plaintiff has established “actual malice” on the part of the defendant.

## ARGUMENT

### I. The Constitutional Protections of *Gertz* Should Not Depend on Whether the Speaker is "Media" or "Non-media"

This Court has ruled, in several contexts, that the protections of the First Amendment cannot be diminished simply because of the status of the person or entity claiming those protections. *See, e.g., First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978), in which the Court noted:

The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.

Indeed, the First Amendment focuses as much on the interest of the listener (and on the process of communication itself) as on the interest of the speaker. *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc.*, *supra*, 425 U.S. at 756-57. Thus, while "the media" or "the press" may require special First Amendment treatment when their unique function is at issue,<sup>1</sup> in a defamation action the

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<sup>1</sup> *Amicus* submits that "media"/"non-media" or "press"/"speech" distinctions may be required in certain contexts. Thus, for example, a commercial advertisement will likely be treated as "commercial speech" subject to certain kinds of regulation in the hands of the advertiser, but not in the hands of the newspaper publisher. This is so because, from the viewpoint of the advertiser, a particular advertisement partakes of what Justice Blackmun, for the Court, called the "commonsense differences" between "commercial speech" and other expression, *i.e.*, greater ease of verification and less "likelihood of its being chilled by proper regulation and foregone entirely." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, *supra*, 425 U.S. at 771-72 n.24.

From the viewpoint of the press, however, publishing the same commercial advertisement does not differ significantly from publishing other material. There is no inherently greater ease of verification by

constitutional rule developed in *Gertz* should apply irrespective of the status of the speaker.

In any event, the distinction between a "media" and a "non-media" defendant cannot easily or fruitfully be applied in defamation cases; it is almost certain to be an unworkable concept in the future development of defamation law. As described in the *amicus* brief of the Information Industry Association, we live in a time of explosive growth in communications technology that promises entirely new methods of disseminating raw data, news and opinion. One scholar has recently canvassed these technological developments and probable developments with particular reference to their implications for traditional concepts of media protection and regulation, and concluded that virtually all our current attitudes toward media communications must change to accommodate the revolution wrought by that development. I. Pool, *Technologies of Freedom* 212-17 (1983).

One need not await the future, however, to see the difficulties that a "media"/"non-media" distinction in the defamation context would inevitably raise. News of bankruptcy filings, for example, is highly significant. It is frequently carried in the pages of *The Wall Street Journal*. (Recent Chapter XI petitions by Air Florida and Charter Co. are illustrative.) It is "newsworthy" largely because of the economic impact bankruptcy

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the publisher of advertising claims than there is with respect to other factual material that it publishes. And, particularly in light of the press' virtually absolute right to reject advertising, there is a substantial likelihood of "chill" resulting from any governmental regulation that imposes potential liability on the press. *See generally* A. Hill, *Defamation and Privacy Under the First Amendment*, 76 Colum. L. Rev. 1205, 1223 (1976). *Cf. Bigelow v. Virginia*, 421 U.S. 809, 828-29 (1975).

In other contexts, too, it is submitted that a distinction between those who are exercising a press function (including, perhaps, Dun & Bradstreet) and those who are not may be required. *Amicus'* observations on this issue are contained in R. Sack, *Reflections on the Wrong Question: Special Constitutional Privilege for the Institutional Press*, 7 Hofstra L. Rev. 629 (1979).

proceedings are likely to have on creditors, employees, shareholders and others. There can be no doubt, as discussed in Point II below, that such reports are entitled to full constitutional protection under the rules enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Gertz v. Robert Welch, Inc.*, *supra*, 418 U.S. 323.

Such *Wall Street Journal* information is now stored in the Dow Jones News/Retrieval data base subsequent to its publication in the *Journal*, where it is available for retransmission to the five, fifty or five thousand subscribers who may happen, electronically, to demand it. In the future, at least some such information may by-pass publication in the *Journal*, and be sent directly to and be stored in a data base. When any such information is supplied to inquiring subscribers, its dissemination fulfills precisely the same function it does when it is published in the newspaper. As with print publication, it is disseminated because of the economic impact it is likely to have—on creditors, employees, shareholders and others—and their consequent interest in the information. Electronic dissemination is used simply because it is more efficient and therefore ultimately more economical than traditional means, and because it offers the advantages of user selectivity and continuous, instantaneous updating.

If publications about bankruptcies in print publications are constitutionally protected—as they are (see Point II, below)—it is impossible to understand why parallel electronic publication should not or would not be. Yet, the implications of the Vermont Supreme Court's opinion below are directly to the contrary: Dun & Bradstreet's activity held by the Vermont Supreme Court to be without the constitutional safeguards set forth in *Gertz* appears to be indistinguishable, for legal purposes, from the kind of electronic publishing in which Dow Jones and many others now engage.<sup>2</sup>

<sup>2</sup> This is not to say that States, under the latitude allowed to them under *Gertz*, are unable to make legal distinctions based on the different characteristics of the various media. Thus, for example, a

Thus, it is submitted that either the "media"/"nonmedia" distinction is not viable in this context, or the term "media" must be broadened to include all those who gather and disseminate information—including data-base publishers like Dow Jones and including petitioner Dun & Bradstreet in the case at bar.

## **II. The Dissemination of Information is Entitled to Undiluted First Amendment Protection Whether or Not its Subject Matter Concerns "Commerce" or "Economics"**

Beginning as early as *Valentine v. Chrestensen*, 316 U.S. 52 (1942), and more recently in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, *supra*, 425 U.S. 748, and subsequent cases, the Court has delineated a category of "commercial speech" that has "less protection" than "other constitutionally safeguarded forms of expression." *Bolger v. Youngs Drug Products Corp.*, \_\_\_\_ U.S. \_\_\_, 103 S. Ct. 2875, 2879 (1983). The Court has been careful, however, to define precisely what it means by "commercial speech," and to warn that "the speech whose content deprives it of protection cannot simply be speech on a commercial subject." *Virginia State*

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defamed party may be expected to become immediately aware of a defamatory utterance in the printed press, whereas a substantial period of time may elapse before the same party becomes aware of defamatory material contained in a data base. There would presumably be no constitutional impediment for state law to recognize this factor by holding that defamation statutes of limitation run from the date of publication in the case of print or broadcast media, but from the date the plaintiff could reasonably have discovered it in the case of data-base (or credit information) defamation. See generally *Holloway v. Butler*, 662 S.W.2d 688 (Tex. Civ. App. 1983); *McGuiness v. Motor Trend Magazine*, 129 Cal. App.3d 59, 180 Cal. Rptr. 784 (Cal. Ct. App. 1982), and cases cited therein. Similarly, certain requirements of access to potentially defamatory material by its subjects that might present constitutional problems in the print context, see *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), may be permissible where data-base (or credit information) publishing is concerned.

*Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, *supra*, 425 U.S. at 761.<sup>3</sup>

“Commercial speech” is speech that “does ‘no more than propose a commercial transaction.’” *Id.* at 762, quoting *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, *supra*, 413 U.S. at 385. Like contract terms, or a statement in a securities prospectus that is subject to federal regulation, the status of such speech in the less-protected category of “commercial speech” derives not from the identity of the words or their capacity to convey information but from their function: They are themselves acts. For this reason, the regulatory statutes and administrative provisions involved in the “commercial speech” cases did not purport to adjudicate between “true” and “false” statements, but rather regulated statements incidentally made in furtherance or as part of commercial activity as an element of the State’s right to regulate the activity itself.<sup>4</sup>

By contrast, the Dun & Bradstreet communication in this case and the dissemination of information in which Dow Jones is involved do not “propose a transaction,” nor do they constitute a legal, commercial or economic act. Unlike the

<sup>3</sup> The Court has also warned against the “risk of broadening a category of unprotected speech.” *Bose Corp. v. Consumers Union of United States, Inc.*, \_\_\_\_ U.S. \_\_\_, \_\_\_\_ S. Ct. \_\_\_, 52 U.S.L.W. 4513, 4519 n.23 (April 30, 1984).

<sup>4</sup> The application of certain statutes and regulations to conduct that includes speech, of course, may involve determining whether or not that speech was false or misleading. For example, the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder by the Securities & Exchange Commission, 17 C.F.R. § 240.10b-5 (1983), prohibit a “device, scheme or artifice to defraud” and thus may penalize knowingly false or misleading statements that induce another to buy or sell a security in violation of the Act. But the statute and rule themselves do not regulate untruthful information, nor do they require a distinction between truthful and untruthful speech. Rather, their focus is on whether there has been a “scheme to defraud.” It is the act or conduct involved—the “scheme”—not the content of the speech itself, that is the legitimate focus of the government’s regulatory effort.

advertisers in all of the commercial speech cases, Dun & Bradstreet had no economic interest in the subject matter of its communication other than—like the *New York Times* in *New York Times Co. v. Sullivan*, *supra*, 376 U.S. 254—as its publisher. The communication is informational rather than propositional, its words have no intrinsic legal significance, and its alleged impact on the plaintiff derives solely from the fact that the statement contained in it may be (or be found by a jury to be) false. Because Dun & Bradstreet is engaged in the dissemination of information in the content of which it has no interest other than as publisher, its communications are not “commercial speech” relegated to lesser First Amendment protection, but rather informational speech entitled to all the First Amendment safeguards articulated in *Gertz*.

Individuals and organizations that disseminate information—whether newspapers, broadcasters, disseminators of financial information like Dun & Bradstreet, or publishers involved in a variety of means and formats of communication like Dow Jones—disseminate facts. The facts may be of personal interest to the recipient, such as the birth, death and wedding notices in a newspaper; they may be of recreational or educational interest, such as sports statistics and announcements of cultural events; they may be of political interest, such as the results of elections; or they may be instructive or profitable to the recipient in guiding his own economic decisions. Examples of the last category are, of course, the business sections of virtually every newspaper, which typically reports on the earnings, sales, activities, or bankruptcies of the companies it covers, investor-oriented publications, such as *Barron’s*, of interest to those hoping to profit from investments, and consumer magazines such as *Consumer Reports*, which offer assessments of consumer items to help a purchaser make an informed decision.

The recipient of the information buys it from the person or entity that disseminates it because the disseminator has specialized in obtaining, editing, and distributing the kind of information that the recipient wants to receive. Because factual

statements are capable of being wholly or partially false, and because a false statement may cause injury to reputation, the common law of the various States generally provides for recovery in defamation for damage caused to a plaintiff by a false factual statement about him. But the "commercial speech" cases have no bearing on any of this, not only because they deal exclusively with a governmental regulatory framework as demonstrated in Point III, *infra*, but because the element that makes "commercial speech" subject to limited regulation is not its capacity to inform or mislead but its significance as a legal, commercial or economic act.<sup>5</sup>

<sup>5</sup> In a footnote to its opinion in *Virginia State Board of Pharmacy* the Court suggested that certain attributes of "commercial speech" may "make it less necessary to tolerate inaccurate statements for fear of silencing the speaker." 425 U.S. at 772 n. 24. Two attributes of commercial speech described by the Court were that "[t]he truth of commercial speech . . . may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else," and also that commercial speech is "more durable" than other speech since "advertising is the *sine qua non* of commercial profits . . . ." *Id.* See also *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 564 n. 6 (1980).

The communication at issue in this case—and the kind of commercial news and information disseminated by Dow Jones—share neither of these attributes. The information Dun & Bradstreet sent to five of its subscribers about Greenmoss, and similar information Dow Jones may supply to its readers and subscribers, is obviously not "about a specific product or service that [either] provides," and thus is "verifiable" only to the extent that, and in the same manner as, any news report is verifiable by a publisher. Moreover, financial and commercial information is inherently no more "durable" than any other kind of news information, since the economic interest of the speaker is not in selling a product about which the communication relates (such as is true with respect to an advertisement); rather, Dun & Bradstreet's and Dow Jones' economic interest—like that of any newspaper or other disseminator of information—derives solely from its success in the process of disseminating the information. In short, an exorbitant verdict could easily induce Dun & Bradstreet or Dow Jones to restrict

In the commercial speech cases themselves the Court has recognized the fundamental distinction between communication that is propositional or transactional on the one hand, and speech that is informational on the other. In *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), for example, the Court acknowledged the township's substantial interest in regulating the underlying conduct at issue—the induced sale of real estate based on racial fears or prejudices. The flaw in the ordinance struck down in that decision was its failure to restrict its impact to the transactional aspect of the activity it sought to control, and its impermissible impact on the "free flow" of information:

The Council's concern, then, was not with any commercial aspect of 'For Sale' signs—with offerors communicating offers to offerees—but with the substance of the information communicated to Willingboro citizens.

*Id.* at 96.

Similarly, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, *supra*, 425 U.S. 748, the Court held that while a State "is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways," *id.* at 770, it may not suppress the dissemination of "information."

It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.

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the amount or the kind of information they distribute, or dissuade others from entering into the marketplace in which Dun & Bradstreet and Dow Jones sell their information products, to the loss of those subscribers and potential subscribers who depend on such information in conducting their affairs. Unlike the regulation of commercial speech in *Virginia State Board of Pharmacy*, presumed and punitive damages imposed on the speech in this case raise a "fear of silencing the speaker."

*Id.* See also *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, *supra*, 447 U.S. at 563 (“The First Amendment’s concern for commercial speech is based on the informational function of advertising”).

This Court and the lower courts have thus applied the full protection of the First Amendment to speech on commercial subjects. Just last Term, this Court reviewed the sufficiency of the evidence before the trier of fact concerning the precise factual determination mandated by *Gertz* as the minimum prerequisite for presumed or punitive damages, namely, whether the speaker in question acted with “actual malice” within the meaning of *New York Times Co. v. Sullivan*. See *Bose Corp. v. Consumers Union of United States, Inc.*, *supra*, \_\_\_\_ U.S. \_\_\_, \_\_\_\_ S. Ct. \_\_\_, 52 U.S.L.W. 4513. The Court concluded that there was insufficient evidence to show that an article about the technical performance of high fidelity speakers was written with “actual malice,” and thus affirmed the Court of Appeals’ decision to dismiss the complaint.<sup>6</sup>

There has never been any doubt in this Court that speech *about* commerce, economics or finance is entitled to full First Amendment protection. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, *supra*, 425 U.S. at 761, 763, 765. See also *Abood v. Detroit Board of Education*, 431 U.S. 209, 231 (1977) (“cases have never suggested” that expression on economic matters “is not entitled to full First Amendment protection”); *United Mine Workers of America, District 12 v. Illinois State Bar Association*, 389 U.S. 217, 223

<sup>6</sup> In *Bose*, the District Court concluded that the plaintiff was “a ‘public figure’ as that term is defined in *Gertz*,” \_\_\_\_ U.S. at \_\_\_, \_\_\_\_ S. Ct. at \_\_\_, 52 U.S.L.W. at 4514, an issue which this Court did not review. See *id.*, \_\_\_\_ U.S. at \_\_\_\_ n. 8, \_\_\_\_ S. Ct. at \_\_\_\_ n. 8, 52 U.S.L.W. at 4515 n. 8. Whether or not plaintiff was a public figure, of course, would have had no bearing on the resolution of the case if the Court had concluded that constitutional protections were inapplicable to the kind of speech involved in that case.

(1967), quoting *Thomas v. Collins*, 323 U.S. 516, 531 (1945) (“a free press [is] not confined to any field of human interest”); *Thornhill v. Alabama*, 310 U.S. 88, 95, 102 (1940) (framers’ “confidence in the power of free and fearless reasoning and communication of ideas” in search for, *inter alia*, “economic truth;” necessity for freedom of discussion to embrace “all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period”).

And lower courts have uniformly treated speech about commercial, economic and financial subjects as fully protected under the First Amendment. In the federal courts see, e.g., *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984) (access); *In re Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984) (access); *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5 (2d Cir.), cert. denied, 459 U.S. 909 (1982) (subpoena); *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir.), cert. denied, 449 U.S. 898 (1980) (libel); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264 (3d Cir. 1980) (libel); *Southard v. Forbes, Inc.*, 588 F.2d 140 (5th Cir.), cert. denied, 444 U.S. 832 (1979) (libel); *Orr v. Argus-Press Co.*, 586 F.2d 1108 (6th Cir. 1978), cert. denied, 440 U.S. 960 (1979) (libel); *Drotzmanns, Inc. v. McGraw-Hill, Inc.*, 500 F.2d 830 (8th Cir. 1974) (libel); *United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc.*, 404 F.2d 706 (9th Cir. 1968), cert. denied, 394 U.S. 921 (1969) (libel); *Simmons Ford, Inc. v. Consumers Union of United States, Inc.*, 516 F. Supp. 742 (S.D.N.Y. 1981) (libel); *In re Consumers Union of United States, Inc.*, 495 F. Supp. 582 (S.D.N.Y. 1980) (subpoena); *In re Forbes Magazine*, 494 F. Supp. 780 (S.D.N.Y. 1980) (subpoena); *Reliance Insurance Co. v. Barron’s*, 442 F. Supp. 1341 (S.D.N.Y. 1977) (libel).

There is simply no significant distinction between the reporting of financial information by Dun & Bradstreet or Dow Jones and dissemination of information in other contexts that have traditionally received undiluted First Amendment protection. Even with respect to the limited category of “commercial

speech," as this Court has observed, the interest of the recipient "in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, *supra*, 425 U.S. at 763. For this reason, society itself has a "strong interest in the free flow of commercial information." *Id.* at 764.

Courts and commentators alike have recognized that the "free flow" of credit information such as that distributed by Dun & Bradstreet is "indispensable." *Id.* at 765. See Testimony of Dr. Andrew F. Brimmer, former member of the Board of Governors of the Federal Reserve System, in "Economic Impact of Regulatory Delay in Commercial Credit Reporting," *The Impact of Commercial Credit Reporting Practices on Small Business, 1979 Hearings Before the Select Committee on Small Business, United States Senate, 96th Cong., 1st Sess.* (1979):

The importance of credit in furthering trade and economic growth is widely known. As economic growth of the nation created wider markets, and transportation and communication advances furthered this process, the need to extend more credit in growing markets created a parallel need for information. *The role of credit information agencies in expanding the market and furthering economic growth is equally well known.*

*Id.* at 323-24 (emphasis added). See also *Mooney v. Davis*, 75 Mich. 188, 192, 42 N.W. 802, 803 (1889) ("these [credit] agencies have become almost a necessity in the transaction of commercial business. . . ."); P. Earling, *Whom To Trust: A Practical Treatise on Mercantile Credits* (1890) ("It may also be added that our present widely extended credit system is largely due to the labors of the [credit] Agencies, and that it is no longer a disputed question that they supply a want, and are indispensable to the public business"). The financial information involved here or other information of commercial significance to the recipient is of no less "potential interest and value" to the recipient, *Bigelow v. Virginia*, *supra*, 421 U.S. at

822, than the functionally similar speech in *Bose* or, for that matter, what was little more than gossip in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

If the Court were to rule that speech is entitled to a lesser degree of protection simply because of the "commercial or economic nature" of its content, it would open a Pandora's box requiring it to scrutinize the content of the speech involved in all defamation cases to determine the extent to which it was commercial or economic and the resultant level of protection. It was precisely what it viewed as a "case-by-case" approach, initially articulated by a plurality in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), that the Court explicitly rejected in *Gertz*:

But this [“case-by-case”] approach would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an *ad hoc* resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application. Such rules necessarily treat alike various cases involving differences as well as similarities. Thus it is often true that not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority.

418 U.S. at 343-44.<sup>7</sup>

<sup>7</sup> The presumed economic motivation of the speaker is, of course, irrelevant to determining whether his speech is entitled to full First Amendment protection. While Dun & Bradstreet and Dow Jones presumably disseminate information in the hope of thereby making a profit, that is undoubtedly true of most newspapers, booksellers, broadcasters, or other disseminators of fact or opinion. For this reason, in *New York Times Co. v. Sullivan*, *supra*, 376 U.S. 254, the Court rejected a suggestion that the advertisement in question in that case was entitled to a lesser degree of protection, noting that the fact that "the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold." *Id.* at 266. As one commentator has noted,

(footnote continued on following page)

The dissemination of commercial and economic information is unquestionably entitled to full First Amendment protection. No First Amendment interest suggests any reason why the "broad rules of general application" articulated in *Gertz, supra*, 418 U.S. at 343-44, should apply in a limited or diluted fashion to speech that is "of a commercial or economic nature."

### III. The "Commercial Speech Doctrine" Does Not Apply in a Defamation Action

Ten years ago, in *Gertz v. Robert Welch, Inc., supra*, 418 U.S. 323, the Court explored in detail the limits imposed by the First and Fourteenth Amendments on a defamation action brought by a plaintiff who is neither a "public official" nor a "public figure." Rejecting the plurality's conclusion in *Rosenblum v. Metromedia, Inc., supra*, 403 U.S. 29, which had focused on whether the plaintiff in a defamation action was "a subject of public or general interest," *id.* at 43, the Court held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability . . . ." 418 U.S. at 347. But after concluding that "the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual," 418 U.S. at 345-46, the Court took an entirely different approach to the limits imposed by the First and Fourteenth Amendments on presumed or punitive damages, and the competing interests involved. Since the Court's analysis of these interests is central to the issues raised here, the entire line of reasoning should be considered:

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Economic motivation could not be made a disqualifying factor [from maximum protection] without enormous damage to the first amendment. Little purpose would be served by a first amendment which failed to protect newspapers, paid public speakers, political candidates with partially economic motives and professional authors.

D. Farber, *Commercial Speech and First Amendment Theory*, 74 Nw. U. L. Rev. 372, 382-383 (1979) (footnotes omitted).

For the reasons stated below, we hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.

We would not, of course, invalidate state law simply because we doubt its wisdom, but here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved. It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. . . .

We also find no justification for allowing awards of punitive damages against publishers and broadcasters

held liable under state-defined standards of liability for defamation. In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence. In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.

*Id.* at 349-50.

This minimum test established by the Court in *Gertz* was both prescient and wise. The Court in 1974 foresaw the possibility of an explosion of multi-million dollar defamation verdicts such as that which has occurred within the last decade. Several of these are described in the brief *amicus curiae* of the *Washington Post* filed in this action; many of them involved presumed or punitive damages that were ultimately found by appellate courts to be in "wholly unpredictable amounts" or "bearing no necessary relation to the actual harm caused." The Court has had no occasion to limit the rule on punitive damages announced in *Gertz*, and, indeed, has relied on *Gertz* in subsequent discussion of punitive damages. *See, e.g., Smith v. Wade*, 461 U.S. 30, 103 S. Ct. 1625, 1636 (1983).

Beginning in the Term before *Gertz*, in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, *supra*, 413

U.S. 376, and continuing through the decade that followed, the Court has, in an entirely separate line of decisions, grappled with a problem that is entirely different from that raised and decided in *Gertz*. In the "commercial speech" cases, the Court has attempted to accommodate within the limits of the First and Fourteenth Amendments the States' police power to regulate commercial and economic activity. Reasoning that "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity," *Ohralik v. Ohio State Bar Association*, *supra*, 436 U.S. at 456, the Court has recognized "the 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Id.* at 455-56. In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, *supra*, 447 U.S. 557, the Court distilled its "commercial speech" cases into a four-part test to determine the validity of a State's "regulatory technique," *id.* at 564, as applied to commercial speech.

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

*Id.* at 566.

The hallmark of all of the Court's "commercial speech" decisions is that they involve governmental attempts to ban, limit, or regulate commercial activity that only incidentally included speech; none of the commercial speech cases involved a defamation action. *See Bolger v. Youngs Drug Product Corp.*, *supra*, \_\_\_\_ U.S. \_\_\_, 105 S. Ct. 2875 (application of 39 U.S.C. § 3001(e)(2) prohibiting mailing of unsolicited ad-

vertisements for contraceptives); *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982) (application of village ordinance requiring a license for any business selling paraphernalia usable for drugs); *In re R.M.J.*, 455 U.S. 191 (1982) (application of a state judicial rule regulating advertising by lawyers); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (application of city ordinance regulating outdoor advertising displays); *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, *supra*, 447 U.S. 557 (application of public service commission regulation banning advertising by an electric utility); *Friedman v. Rogers*, 440 U.S. 1 (1979) (application of state statute prohibiting the practice of optometry under a trade name); *Ohralik v. Ohio State Bar Association*, *supra*, 436 U.S. 447 (application of judicial disciplinary rules to attorney solicitation); *In re Primus*, 436 U.S. 412 (1978) (application of judicial disciplinary rules to attorney solicitation); *First National Bank of Boston v. Bellotti*, *supra*, 435 U.S. 765 (application of a state criminal statute prohibiting political expenditures by corporations); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (application of judicial disciplinary rule to prohibit attorney advertising); *Carey v. Population Services International*, 431 U.S. 678 (1977) (application of state criminal statute prohibiting advertising of contraceptives); *Linmark Associates, Inc. v. Township of Willingboro*, *supra*, 431 U.S. 85 (application of township ordinance prohibiting "for sale" signs); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, *supra*, 425 U.S. 748 (application of state statute prohibiting licensed pharmacists from advertising the prices of prescription drugs); *Bigelow v. Virginia*, *supra*, 421 U.S. 809 (application of state criminal statute prohibiting advertisement for an abortion); *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, *supra*, 413 U.S. 376 (application of city ordinance prohibiting gender-discriminatory advertisements).

The Court has compared these "commercial speech" cases with earlier decisions upholding "the validity of reasonable

time, place, or manner regulations that serve a significant governmental interest . . . , and which similarly apply only incidentally to speech. *Consolidated Edison Co. v. Public Service Commission of New York*, 447 U.S. 530, 535 (1980); *cf. Cox v. New Hampshire*, 312 U.S. 569 (1941) (licensing requirement for parades through city streets); *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (application of an anti-noise regulation to demonstrations). In short, the "commercial speech" decisions of this Court have exclusively involved challenges to governmental regulatory efforts. The classification of speech as "commercial" under the definitions quoted above, and the determination to accord "less protection to commercial speech than to other constitutionally safeguarded forms of expression," *Bolger v. Youngs Drug Products Corp.*, *supra*, \_\_\_\_ U.S. at \_\_\_\_, 103 S. Ct. at 2874, depended "on the nature both of the expression and of the governmental interests served by its regulation." *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, *supra*, 447 U.S. at 563 (emphasis added). Punitive damages in defamation suits self-evidently do not involve governmental "regulation" at all, but rather are punishment for speech because of its content. The commercial speech cases are thus inapplicable to any defamation action.

More importantly, a comparison of the rationale for the commercial speech decisions with the Court's reasoning in *Gertz* demonstrates that the "commercial speech" distinction provides no basis for limiting the minimum constitutional protection for defendants in defamation cases so painstakingly articulated in *Gertz*. Key to the Court's analysis of a State's effort to ban or regulate commercial speech are an assessment of the State's interest cited as "justification[]" for the regulation, *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, *supra*, 447 U.S. at 568, an analysis of the relationship between the State's interests and the regulation involved, *id.*, and an inquiry whether the regulation "is no more extensive than necessary to further the State's interest . . . ." *Id.* at 569-70. Emphasizing both that the State must articulate a real and significant state interest and must demon-

strate that it has adopted the narrowest means reasonably calculated to accomplish that interest, the Court has upheld certain narrowly drawn, carefully focused regulatory provisions, *see, e.g.*, *Ohralik v. Ohio State Bar Association, supra*, 436 U.S. 447; *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, *supra*, 455 U.S. 489, and has struck down other regulations where the regulation was not “narrowly drawn” to protect a “substantial interest.” *In re R.M.J.*, *supra*, 455 U.S. at 203.

By contrast, the Court’s ruling in *Gertz* with respect to presumed damages was precisely that “the states have *no substantial interest* in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury,” 418 U.S. at 349 (emphasis added), and similarly that “punitive damages are *wholly irrelevant to the state interest* that justifies a negligence standard for private defamation actions.” *Id.* at 350 (emphasis added). Thus, there is nothing to be weighed.

Moreover, as the Court recognized in *Gertz*, presumed or punitive damage awards by jurors are the very antithesis of a “narrowly drawn” response to a sharply focused “substantial need.” Instead, presumed and punitive damages are the result of “[t]he largely uncontrolled discretion of juries,” *id.* at 349, may be based on bias or hostility, *id.*, and are generally “limited only by the gentle rule that they not be excessive,” with the result that juries frequently assess punitive damages in “wholly unpredictable amounts bearing no necessary relation to the actual harm caused.” *Id.* at 350.

By the very nature of their composition and the function they serve, juries cannot be expected to perform in any given case the careful balancing function that this Court has evolved over a decade in the commercial speech cases. Rather, the balancing of interests in defamation cases as a group was accomplished by the Court in *Gertz*, when it ruled that with respect to actual damages a private defamation plaintiff may recover on any state law theory based on fault, but that the

State’s interest in protecting a private defamation plaintiff does not justify presumed or punitive damages—at least unless the plaintiff succeeds in showing “actual malice.”

The commercial speech cases focus on regulating acts and recognize no state interest in regulating the content of informational speech. The analysis underlying these cases is inapplicable to a defamation suit and provides no basis for rethinking or revising the balance struck in *Gertz*.

#### **IV. Presumed and Punitive Damages in Defamation Actions Violate the First and Fourteenth Amendments**

The *Washington Post* demonstrates in its *amicus* brief filed in this action that while “*Gertz*’s double negative” prohibits the imposition of presumed or punitive damages “at least” if a defamation plaintiff does not prove “actual malice,” the opinion does not expressly permit the recovery of such damages upon that showing. Its demonstration that the sheer size and frequency of such verdicts will chill protected speech is a strong one, and Dow Jones joins in the *Washington Post*’s argument that permitting the imposition of presumed or punitive damages on *any* showing presents a profound danger to free expression, particularly by unpopular speakers, that would violate the First and Fourteenth Amendments. It also agrees with the *Washington Post*, however, that the Court should not reach that issue in this case but need only decide whether the Supreme Court of Vermont erred in denying petitioner the minimum protection mandated by *Gertz*.

## CONCLUSION

The judgment of the Supreme Court of Vermont should be reversed.

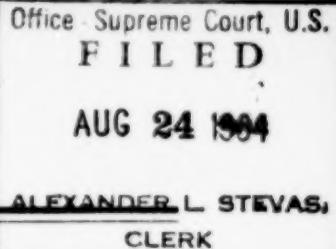
Dated: July 30, 1984

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No. 83-18

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1984

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DUN & BRADSTREET, INC.,

v.

*Petitioner,*

GREENMOSS BUILDERS, INC.,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE SUPREME  
COURT OF THE STATE OF VERMONT

---

**BRIEF AMICUS CURIAE IN SUPPORT OF  
RESPONDENT GREENMOSS BUILDERS, INC.**

---

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No. 83-18

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1984

DUN &amp; BRADSTREET, INC.,

v.

*Petitioner.*

GREENMOSS BUILDERS, INC.,

*Respondent.*

ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF VERMONT

**BRIEF AMICUS CURIAE IN SUPPORT OF  
RESPONDENT  
GREENMOSS BUILDERS, INC.**

Sunward Corporation ("Sunward") respectfully submits this brief as an amicus curiae in support of Respondent Greenmoss Builders, Inc. The parties have given their written consent to the filing of this brief, and copies of the letters of consent have been filed with the Clerk.

**INTEREST OF THE AMICUS**

Sunward is a party to a case now pending before the Tenth Circuit Court of Appeals, *Sunward Corp. v. Dun & Bradstreet, Inc.*, appeal docketed, No. 83-2644 (10th Cir. Dec. 23, 1983), in which Sunward recovered approximately \$3.8 million against Dun & Bradstreet, Inc. ("D&B") for publication of libelous credit reports. In that case, Sunward relied upon the doctrine of presumed damages. (The interest of

Sunward is more fully set forth in its previous Motion for Leave to File Amicus Brief and the brief accompanying that motion.) The purpose of this brief is to elaborate on the arguments set forth in the previous brief in light of the questions posed by the Court for supplemental briefing.

### SUMMARY OF ARGUMENT

Presumed damages in business libel situations serve the legitimate state interest of compensating defamed plaintiffs. The Court should not interfere with this interest since, because of the characteristics both of credit report speech and of Dun & Bradstreet as speaker, presumed damages are not likely to chill protected speech.

Because credit reports share common traits with advertising, the Court should classify the reports as commercial speech. Moreover, the Court need not decide the exact level of protection mandated for credit reports by the commercial speech doctrine because the majority of states protect Dun & Bradstreet from liability, and accordingly from presumed damages, by extending a conditional privilege to credit reports. Thus, a plaintiff cannot recover presumed damages except in instances when Dun & Bradstreet has acted recklessly or maliciously. Although the culpability requirement differs from the reckless disregard standard defined in the Court's decisions in *New York Times* and *Gertz*, it adequately protects Dun & Bradstreet from self-censorship, and makes superfluous any further protection extended by the commercial speech doctrine.

### ARGUMENT

[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include

vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

*New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). With this principle in mind, the Court began its attempt to achieve the proper balance between the first amendment and the common law of defamation. The effort has not been easy. The Court has divided sharply at times, see, e.g., *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), and overturned previous decisions, see *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) ("overruling" *Rosenbloom*'s public interest test). Last term the Court reaffirmed the underlying principles of *New York Times* in upholding the requirement of *de novo* appellate review of a fact finder's determination of "actual malice." *Bose Corp. v. Consumers Union of United States, Inc.*, 104 S.Ct. 1949 (1984). In doing so, however, the Court was addressing speech regarding an issue quite different from the one in *New York Times*.<sup>1</sup> The irony that *Bose* should secure a place among the progeny of *New York Times* and *Gertz*, was not lost upon the Court.

[T]he analysis of the central legal question before us may seem out of place in a case involving a dispute about the sound quality of a loudspeaker.

104 S.Ct. at 1967. See also *id.* (Rehnquist, J., dissenting) (noting irony of extending *New York Times* to "false statements about a commercial loudspeaker system").

Now comes forth yet another party to claim its place as an heir to the *New York Times/Gertz* lineage. Dun & Bradstreet — a multimillion dollar purveyor of credit reports — argues that, without the protections against presumed and punitive damages set forth in *Gertz*, its voice will be chilled.

1. The District Court had determined that the principles of *New York Times* and *Gertz* were applicable in a product disparagement suit. 508 F. Supp. 1249, 1271 (D. Mass. 1981). Because that issue was not raised in the Court of Appeals, it was not addressed there. Similarly, this Court took as a given the applicability of *New York Times* and *Gertz*. 104 S.Ct. at 1966.

D&B characterizes its claim to *Gertz* protection as something akin to manifest destiny:

[T]he time has come to carry *Gertz* to its necessary conclusion. The only way to ensure justice is to apply the same constitutional limitations on damages to every defamation defendant.

Petitioner's Supplemental Brief at 23. The issue, however, is not nearly so simple. Dun & Bradstreet is requesting constitutional intervention into the states' law of defamation so that the "free flow" of speech can continue. The question is whether this intervention is really necessary. In other words, do presumed damages, in the context of libelous Dun & Bradstreet credit reports, actually threaten suffocation of protected speech. This brief will establish that presumed damages serve an important state interest in the context of business libel.<sup>2</sup> This interest should not be dismissed as cavalierly as D&B suggests. Further, because of the characteristics of the type of speech in which Dun & Bradstreet engages, extension of the actual malice standard is not necessary to ensure adequate "breathing space" for truthful credit report "speech." To reach this conclusion the Court need not, and arguably should not, resolve the media/nonmedia question.<sup>3</sup> Instead, the Court should classify credit reports as a species

2. Sunward takes no position on the punitive damages issue, which is not presented in its case before the Tenth Circuit, and which is conceptually distinct from the presumed damages issue, notwithstanding the efforts of Dun & Bradstreet and its supporting amici to treat them as one.

3. Dun & Bradstreet and its supporting amicus curiae are not broadly representative of the "nonmedia." In fact, as is implied in their arguments, they might more accurately be referred to as "quasi-media." See, e.g., Brief Amicus Curiae of Information Industry Association at 2-6. Because Dun & Bradstreet's "speech" presents its own unique constitutional questions, the Court's focus should be narrow, and not be broadened to nonmedia speakers who present both a more sympathetic case (e.g., a speaker addressing an audience on a matter of public concern), and less sympathetic case (e.g., a purely private defamation situation, such as when the mother of the groom informs the mother of the bride that the bride is unchaste), for extension of *Gertz*.

of commercial speech, which are adequately protected by the common law in most states. At most, an admonition that the states cannot impose liability without fault would protect D&B's speech.

### I. THE STATES HAVE A LEGITIMATE INTEREST IN PRESERVING THE DOCTRINE OF PRESUMED DAMAGES.

Throughout the briefs of Dun & Bradstreet and its army of amici, it is argued that the *Gertz* analysis of presumed damages is perfectly applicable to cases involving defamatory credit reports in particular, and business libel in general. Additionally, D&B and its supporters equate presumed damages with "windfalls" and assert that these types of damages have no relation to "actual injury." As demonstrated in Sunward's initial amicus brief, Brief of Sunward Corp. at 5-8, Dun & Bradstreet fails to give adequate weight and consideration to the states' interest in allowing presumed damages in the specific area of business libel. Since D&B insists that *Gertz* controls this issue, it is appropriate to examine the distinctions between presumed damages as applied in a business libel case, and as applied in *Gertz*.

In *Gertz*, the Court was faced with the personal defamation of an individual. Under the circumstances of that case, and similar cases involving individual plaintiffs, the doctrine of presumed damages can indeed be "an oddity." 418 U.S. at 349.

No proof of actual damages was offered. Under the Court's instructions, the jury was permitted to presume injury as a matter of law. . . . [I]t assessed plaintiff's damages at \$50,000.

*Gertz v. Robert Welch, Inc.*, 471 F.2d 801, 804 (7th Cir. 1972), *rev'd*, 418 U.S. 323 (1974). Thus, in *Gertz* the determination of damages may indeed have been left to the "uncontrolled discretion" of the jury. 418 U.S. at 349. In a business libel situation, however, and particularly given the jury instructions in both *Greenmoss* and *Sunward*, the jury is provided

more tangible guidance. The jury is not free to award whatever amount it feels is appropriate.

A plaintiff in a business libel situation will introduce evidence of damages of a more tangible nature than will a plaintiff in a case of individual defamation. This evidence will usually take the form of lost profits. Dun & Bradstreet acknowledges this in its brief by noting that a typical business plaintiff will attempt to quantify its damages through projections of sales and profits and comparisons with actual results. Petitioner's Supplemental Brief at 12. Dun & Bradstreet argues, however, that these sales and profit figures are "grossly inflated." To the extent this is true, the abolition of presumed damages is not the answer. Rather, Dun & Bradstreet is free to present evidence questioning the appropriateness of the plaintiff's figures. Indeed, at trial in *Sunward* Dun & Bradstreet did exactly that. Moreover, to the extent the plaintiff's figures are purely speculative, the trial court can exclude the evidence, or instruct the jury not to base any award on speculations. Thus, although both the *Greenmoss* and *Sunward* juries were instructed that damages were presumed, both juries were also told that they could return a verdict of \$1. In other words, the juries did not have to give effect to the presumption. Both juries also were informed that their damage calculations could not be based on speculation. *See also Maheu v. Hughes Tool Co.*, 569 F.2d 459, 474-77 (9th Cir. 1977) (damage award overturned where damage theory based purely on speculation).

Rather than being merely a windfall, the function of presumed damages in a business libel situation is to assist a plaintiff faced with an otherwise insurmountable causation problem. Presumed damages do not leave a jury with unbridled discretion. Instead, the doctrine allows a jury to look at proof of a tangible loss, *i.e.*, lost profits, and decide whether to attribute that loss to the defamatory credit reports. This has apparently always been a function of and rationale for the doctrine. *See W. Prosser, HANDBOOK OF THE LAW OF TORTS* § 112, at 765 (4th ed. 1971) ("[I]t is clear that proof of actual

damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact.").

When a respected organization such as Dun & Bradstreet disseminates a libelous credit report, it is providing this information to subscribers who have expressed an interest about the financial situation of the company that is the subject of the report. It is counter-intuitive to think that such a report can be harmless. In this regard, Dun & Bradstreet's argument contains an inherent contradiction. On the one hand, Dun & Bradstreet seeks first amendment protection because of the importance of its reports both to subscribers and to those about whom the reports are issued. Yet, on the other hand, Dun & Bradstreet implies that a libelous credit report may cause little or no damage. Petitioner's Supplemental Brief at 12.

The factual situation in the *Sunward* case vividly illustrates the dilemma faced by a plaintiff. False and defamatory credit reports were issued for a period of at least three years without the knowledge of Sunward. During this time, sales of the plaintiff declined precipitously, in marked contrast to sales of its competitors, with which Sunward had historically kept pace or bettered. Rumors arose in the industry that the plaintiff was in dire financial straits. To an extent, the rumors became self-fulfilling prophecies. Eventually, Sunward discovered that hundreds of the libelous Dun & Bradstreet reports had been issued. Prominently included among the subscribers were numerous competitors of the plaintiff. Sunward was unable, however, to trace the libelous credit reports to specific lost sales or denials of credit. Under these circumstances, Sunward based its damage theory on a comparison of Sunward's sales in relation to the steel building industry prior to the reports, and its sales in comparison with the industry during the time of the distribution of the libelous information. Dun & Bradstreet was not saddled with acceptance of this damage figure. The trial of the case involved an intense

dispute regarding whether Sunward's precipitous decline in sales was actually the result of an overall decline in the agricultural market, which Dun & Bradstreet argued was a major outlet for Sunward's product. The jury resolved this evidentiary dispute and awarded Sunward approximately \$3.8 million. This amount was significantly less than Sunward's overall decline in profits and its losses during the years in question.

In a business libel context, presumed damages serve what amounts to a burden shifting purpose. To the extent that uncertainty exists regarding whether a defamatory credit report actually caused lost profits, Dun & Bradstreet, the wrongdoer, should bear the burden of that uncertainty. This is particularly appropriate since Dun & Bradstreet, with its confidentiality requirements, contributes to the causation problem. The standard Dun & Bradstreet contract restricts subscribers in attributing information to Dun & Bradstreet, making it difficult or impossible to trace negative information back to a libelous report.<sup>4</sup>

Dun & Bradstreet has argued that, by definition, this is not the case where a plaintiff has discovered the existence of a defamatory report and brought suit against Dun & Bradstreet. Once suit is brought, the plaintiff can obtain subscriber lists through discovery and attempt to elicit information from those subscribers regarding the effect of the defamatory credit reports. Dun & Bradstreet's argument,

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4. The standard Dun & Bradstreet contract contains restrictions stating as follows:

All information furnished hereunder shall be held in strict confidence and shall never be reproduced, revealed or made accessible in whole or in part, in any manner whatsoever to any others unless required by law.

Neither Dun & Bradstreet, Inc. nor the Reference Books and/or Directories will be identified by the subscriber as a source reference . . .

See Appendix to Sunward's Initial Amicus Brief, ¶¶ 2 & 5, at A-2.

however, overlooks two critical points. First, the subscribers may often be competitors or creditors of the plaintiff, and thus reticent about revealing either their use of the credit report, or its impact upon their actions toward the plaintiff.<sup>5</sup>

Second, the defamatory impact of a libelous credit report may be many times removed from the initial subscriber. In other words, the gist of the defamatory information in a libelous report may be passed from entity to entity, without attribution to Dun & Bradstreet because of its confidentiality agreements. A plaintiff such as Sunward may face rumors in the industry of its demise, and yet find it impossible to trace these rumors back to Dun & Bradstreet.

Eliminating the doctrine of presumed damages would, in many instances, deny any compensation to companies defamed by a libelous credit report, regardless of the harm done thereby. Moreover, because of this Court's expansive definition of "actual injury" in *Gertz*, the elimination of presumed damages would have a disparate impact on defamed companies. In *Gertz*, the Court included in its definition of actual injury such matters as mental distress, humiliation, and embarrassment. 418 U.S. at 350. Obviously, a defamed company cannot recover for having its feelings hurt. A damaged business reputation results in harm to the pocketbook, not the psyche. Under Dun & Bradstreet's argument, a defamed company, which may have suffered tangible pecuniary loss, is denied recovery, while a defamed individual, who also is theoretically denied the benefit of presumed damages, can overcome his causation hurdle simply by testifying

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5. For example, Greenmoss' bank received the libelous Dun & Bradstreet report, and shortly thereafter denied credit to Greenmoss and suggested Greenmoss take its banking elsewhere. Yet at trial, a representative of the bank insisted that the false credit report had no effect on the bank's decision.

regarding his embarrassment, humiliation, and mental distress brought on by the defamatory publication.<sup>6</sup> The discretion of a jury in arriving at an amount to compensate such intangible harm is much more unbridled than in the typical business libel situation. A ruling that would allow an individual such as Mr. Gertz to recover for his hurt feelings,<sup>7</sup> yet deny any relief to Sunward or Greenmoss, would be a greater anomaly than the doctrine of presumed damages.

In summary, the state law of presumed damages in the business libel context serves the significant state interest of assisting a defamed plaintiff in overcoming causation problems in a situation where it is likely that significant damages have occurred. Moreover, juries in these cases are presented with more tangible evidence of the quantity of those damages than in situations involving defamed individuals. Plaintiffs are not free to introduce totally speculative theories about possible lost profits. Dun & Bradstreet is free to introduce evidence attributing to other causes any decline in profits or failure to achieve expected growth. Therefore, the Court clearly is not facing the "oddity of tort law" that was the basis for its ruling in *Gertz*.

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6. The events in *Gertz* subsequent to this Court's remand of that case are enlightening. At his second trial, Mr. Gertz testified to "severe mental distress, anxiety, and embarrassment," which he suffered as a result of the defamatory article. The jury awarded him \$100,000 in compensatory damages for this injury. 680 F.2d 527, 540 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983). See also *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) (although no evidence of harm to reputation, evidence supported injury in form of mental distress; no basis for overturning jury verdict awarding \$100,000).

7. In making this argument, Sunward is not denigrating the value of an individual's reputation. It is simply arguing that the monetary value to be attached to an individual's reputation is harder to quantify than that of a business. Thus, a jury has greater discretion in the former situation than in the latter.

## II. THE TYPE OF "SPEECH" IN WHICH DUN & BRADSTREET ENGAGES IS UNLIKELY TO BE CHILLED BY PRESUMED DAMAGES.

The previous section demonstrates that the states have a legitimate interest in the doctrine of presumed damages in the context of a business libel. One may disagree about whether the doctrine is the most appropriate manner of serving that interest. However, it is not this Court's role to require modification of the common law simply because it is imperfect or unwise.<sup>8</sup> The Court need only ensure that the common law does not transgress the protections set forth in the Constitution. Since false and defamatory speech is not protected for its own sake by the first amendment, modification of state law is only justified if it negatively affects protected (*i.e.*, truthful) speech. Dun & Bradstreet has baldly asserted that presumed damages have such an impact on its credit reports. In other words, Dun & Bradstreet claims that the Court's concern in *Gertz* with "breathing space" for protected speech is directly applicable to credit reports. Dun & Bradstreet has brought forth no empirical evidence in support of this proposition, and in fact, Dun & Bradstreet's "breathing space/chilling effect" argument is deficient in a number of respects.

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8. Dun & Bradstreet and Amicus Curiae Dow Jones & Co. argue that, even if presumed damages for libelous credit reports are equated with state regulation of commercial speech, Dun & Bradstreet should prevail because the doctrine is not "narrowly drawn" to achieve a "substantial state interest." In essence, they challenge the wisdom of using presumed damages to achieve the goal of compensating defamed parties. Their analysis, however, only becomes applicable if the states' "regulation" affects protected speech. False commercial speech is not protected from regulation. Therefore, the Court need not decide whether the doctrine of presumed damages is the best way to achieve the states' interest in compensating defamed parties.

**A. Credit Reports Have Sufficient “Breathing Space” Because of Characteristics of the Speech and Speaker.**

As the Fifth Circuit noted in *Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25, 32 (5th Cir. 1973), *cert. denied*, 415 U.S. 985 (1974), empirical evidence suggests that Dun & Bradstreet, and other credit reporting agencies, exist and thrive in states refusing to extend even a conditional, common law privilege to credit reports. This fact strongly suggests that credit report “speech” is hardy. An examination of the type of speaker Dun & Bradstreet is, and of the type of speech in which it engages, demonstrates the reason for this hardiness.

D&B is an atypical first amendment speaker engaged in atypical first amendment speech. Lower courts have consistently rejected first amendment protection for credit reports. See, e.g., *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829 (8th Cir. 1976) (opinion by Justice Clark); *Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25 (5th Cir. 1973), *cert. denied*, 415 U.S. 985 (1974); *Grove v. Dun & Bradstreet, Inc.*, 438 F.2d 433 (3d Cir.), *cert. denied*, 404 U.S. 898 (1971). The name of the trade association to which Dun & Bradstreet belongs—Information Industry Association—speaks volumes about Dun & Bradstreet, as does the general description of these entities’ operations:

IIA members are united by their interest in delivering information content to the public. Information industry companies create, distribute, and manage a wide range of information content, including news, governmental, economic and academic studies, financial and business data, and virtually any other material for which there is sufficient demand. *They do so by gathering information, by identifying the relevant and significant data, by organizing them for ready access and use, and by marketing their product to people for whom it has value and significance. This information chain is labor intensive, costly, and depends for its success on a constant*

*striving for accuracy because the specific markets served are highly sensitive to error.*

Brief Amicus Curiae of Information Industry Association at 2-3 (emphasis added). This description does not bring to mind first amendment values, such as robust debate on matters of public concern, or a speaker’s interest in self-expression. Instead, this industry is apparently made up of information gatherers and assimilators. The lack of traditional first amendment concerns is even more apparent in Dun & Bradstreet’s stock-in-trade — the credit report. These reports are fact-oriented. They contain no opinion or editorialization. In fact, one of Dun & Bradstreet’s most prominent traits is that it is a speaker without a viewpoint. It cares not whether the content of its speech is pro or con regarding the subject. It cares only that the reports are accurate. The rationale of *Gertz* is completely inappropriate here.<sup>9</sup>

The more closely one scrutinizes Dun & Bradstreet, the more tenuous its “breathing space” argument becomes. Dun & Bradstreet claims that its subscribers and the subjects of credit reports have an interest in timely and accurate information. Note, however, the dual nature of this interest. Accuracy is critical. Although Dun & Bradstreet argues that without *Gertz* protection, information must be “laboriously triple-checked,” Petitioner’s Supplemental Brief at 22, this overlooks Dun & Bradstreet’s own procedures for ensuring the accuracy of information. A reasonable amount of checking is to everyone’s benefit since false information, even if timely, has no utility. In the context of an issue of public concern, a false statement might provoke further debate. *New York Times*, 376 U.S. at 279 n.19. Dun & Bradstreet,

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9. In considering the question of whether *Gertz* should be extended to credit reports, one noted commentator has stated, “[i]f the first amendment requirements outlined in *Gertz* apply, there is something clearly wrong with the first amendment or with *Gertz*.” Shrifin, *The First Amendment and Economic Regulation: Away From A General Theory of the First Amendment*, 78 Nw. L. Rev. 1212, 1268 (1984).

however, does not operate in the marketplace of ideas. It simply operates in the marketplace.

**B. D&B Credit Reports Differ Significantly From "Media" Speech on Similar Topics.**

Dun & Bradstreet has argued that, in some respects, it is no different than many media defendants and that no principled basis exists for denying it the protection of *Gertz*. D&B insists that much of the information contained in its credit reports could, and does, appear in the "media." Therefore, it reasons, no basis exists for applying differing standards to Dun & Bradstreet.<sup>10</sup>

Crucial distinctions, however, exist between Dun & Bradstreet and more traditional media that might justify extending *Gertz* to the latter, but not to the former. First, the bankruptcy listings or criminal proceedings reported in The Burlington Free Press are more subject to a chilling effect than are Dun & Bradstreet's reports. The newspaper can simply decide not to publish risky information. Since its profits stem from other factors, it has no incentive, other than a sense of journalistic professionalism and pride, to publish. See Anderson, *Libel and Press Self-Censorship*, 53 Texas L. Rev. 422, 432 n.52 (1975). Dun & Bradstreet, on the other hand, has a tremendous pecuniary interest in providing information to its subscribers. They purchase Dun & Bradstreet credit reports to secure this type of information, as well as "special notices" such as the bankruptcy report in *Greenmoss*. This supply and demand aspect of credit information can be analyzed in terms of resource allocation and risk spreading.

10. As an initial matter, this argument assumes the question. This Court has not held one way or the other whether basic, factual commercial information published in the press would receive *Gertz* protection. In a different context, the Court has held that commercial speech in a newspaper could be regulated without violating the first amendment. *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973).

[P]rofit would dictate that information suppliers should invest in resources leading to accurate fact-finding only to the point needed to assure maximum profits. Beyond that point, investment in accuracy would be wasteful. Allowing a defamation action in some markets might lead some suppliers to invest more in assuring accurate information and, in any event, would spread the risk of inaccuracy, and compensate for damages resulting from loss of reputation.

Shriffin, *supra* note 9, at 1250 n.247.<sup>11</sup>

Another critical distinction between Dun & Bradstreet and the media involves the audience for credit reports. Dun & Bradstreet targets a limited, private audience. Moreover, through its confidentiality agreements, Dun & Bradstreet operates within a closed system. Thus, a defamed party does not have easy access to the information, which is being distributed to parties expressing, or having previously expressed, a specific interest in the subject of the report. These factors not only increase the risk of harm, they demonstrate a "commonsense" distinction between Dun & Bradstreet and other first amendment speakers.<sup>12</sup> Dun & Bradstreet simply is not interested in the general free flow of information.

11. This economic analysis can be extended to the doctrine of presumed damages. As established earlier, a libelous credit report may cause substantial damages, and yet it may be impossible to causally link the report with the damages. From an allocative efficiency standpoint, these damages represent a hidden cost of the credit reporting business. Presumed damages not only allow a plaintiff to overcome causation problems, but also spread these costs among those who created the costs and are most capable of absorbing them, i.e., Dun & Bradstreet and its subscribers.

12. Amicus Dow Jones & Co. recognizes that the states should be allowed "to make legal distinctions based on the different characteristics of the various media." Brief Amicus Curiae of Dow Jones & Co. at 8-9 n.2. Sunward submits that defamation is one such area in which distinctions should be allowed.

### III. CREDIT REPORTS SHOULD BE CLASSIFIED AS COMMERCIAL SPEECH.

Dun & Bradstreet and the amici have responded to the Court's inquiry about "speech of an economic or commercial nature" by missing the point. First, they argue that such a distinction would be content-based, thereby violating the principles of *Gertz*. Second, they argue that the Court has often ruled that the first amendment extends to expression about numerous matters, including economics and commerce. Third, they claim that the commercial speech doctrine is limited to advertising, and therefore is inapplicable to credit reports. Sunward disputes all these assertions.

#### A. Denying or Limiting First Amendment Protection to Credit Reports Does Not Violate Any Principle Relating to Content-Based Distinctions.

The evils behind content-based distinctions are the necessity of ad hoc determinations by the judiciary regarding whether speech is protected, and the possibility of censorship or punishment of unpopular speech. These are the reasons the *Gertz* court eschewed *Rosenbloom*'s public interest test.<sup>13</sup> When the rationale underlying content-neutrality is examined, it becomes clear that refusing to extend *Gertz* to credit reports would not violate that principle. Credit reports are easily categorized. No ad hoc determinations are required. Moreover, since D&B itself does not have a viewpoint regarding its speech, certainly no fear of government bias exists

13. Despite *Gertz*' rejection of *Rosenbloom*, content remains important in first amendment law in general, and in defamation law in particular. The public figure and public official tests are basically attempts to protect speech of a certain content, but without the necessity of making judgments regarding that content. Note, *Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Nonmedia Defendants*, 95 Harv. L. Rev. 1876, 1882-86 (1982). Of course, content-based distinctions are made in other areas of speech. In fact, the Court has even indicated that "[i]f commercial speech is to be distinguished, it 'must be distinguished by its content'." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 504 n.11 (1981) (quoting *Virginia State Board*, 425 U.S. at 761).

regarding the content of that speech. The evils of content-neutrality are simply not present.

#### B. A Workable Distinction Can Be Drawn Between Speech About Economics and Commerce, and "Speech of an Economic or Commercial Nature."

In addressing the second question posed by the Court for supplemental briefing — whether *New York Times* and *Gertz* should be applied to speech of an economic or commercial nature — D&B and the amici have rephrased the question to ask whether *Gertz* should protect speech *about* matters of economics or commerce. Credit report "speech" is not about economics or commerce. Credit reports contain basically factual material concerning a certain business, e.g., gross sales, number of employees, location, amount of inventory, type of business, payment of debts, bankruptcy filings, and other financial information. Their main characteristic, however, is that they are primarily factual, not analytical. In this sense, Dun & Bradstreet is much like the pharmacist in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976).

Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters.

Similarly, Dun & Bradstreet credit reports do not speak "about" economics and commerce. They express straightforward facts regarding individual businesses.<sup>14</sup>

14. Of course, the Court in *Virginia State Board* went on to recognize that the "commercial speech" in which the pharmacist did desire to engage was entitled to some constitutional protection. Similarly, credit reports may be entitled to some constitutional protection. As will be established below, however, because of the high level of common law protection afforded to credit reports in most states, constitutional protection would be superfluous.

### C. Credit Reports Share Basic Characteristics of Commercial Speech.

Dun & Bradstreet reasons that this Court's commercial speech cases have been limited to states' attempts to regulate advertising. It also notes that the Court has justified lesser protection for commercial speech because it is easily verifiable and is hardy. *See, e.g., Virginia State Board*, 425 U.S. at 772 n.24. Dun & Bradstreet argues that its speech lacks these characteristics, and therefore should not be classified as commercial speech. D&B's niggardly definition of "commercial speech" presents numerous problems. More importantly, regardless of whether D&B's analysis of the Court's commercial speech precedents is correct, credit reports share traits with advertising that make application of *New York Times/Gertz* inappropriate.

Although most of the cases were decided prior to the Court's development of the commercial speech doctrine, lower courts have consistently classified Dun & Bradstreet credit reports as unprotected by the first amendment. *See, e.g., Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25 (5th Cir. 1973), *cert. denied*, 415 U.S. 985 (1974); *Grove v. Dun & Bradstreet, Inc.*, 438 F.2d 433 (3d Cir.), *cert. denied*, 404 U.S. 898 (1971). In doing so, these courts noted the unique characteristics of credit reports, then labelled them commercial speech. This approach not only has intuitive appeal, it can be reconciled with the Court's later decisions on commercial speech.

Although most of the Court's commercial speech cases have dealt with some form of advertising, the Court's definition of commercial speech is capable of a broader application. *See Comment, The New Commercial Speech and the Fair Credit Reporting Act*, 130 U.Pa.L.Rev. 131, 133-145 (1981) (analyzing cases and concluding that credit reports should be entitled to some constitutional protection under commercial speech doctrine). Even if inclusion of credit reports within the definition of commercial speech is an extension of the doctrine, it is a principled and controllable one. A credit

report is a credit report. Because they are easily identifiable, and share the two characteristics of advertising — verifiability and hardiness — credit reports should be classified as commercial speech. Moreover, strong policy concerns support rejection of Dun & Bradstreet's narrow approach to commercial speech.

#### 1. Because of Their Factual Nature, Credit Reports Are Easily Verifiable.

Dun & Bradstreet takes a narrow view of the verifiability question. It relies on the following language in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 564 n.6 (1980): "[C]ommercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages . . . ." D&B then argues that it is not speaking about its own product, and therefore the verifiability rationale does not apply. This argument ignores the factual nature of Dun & Bradstreet's speech, and the critical need for accuracy in it. Because of these two factors, credit report speech is not only verifiable, but to have utility, subscribers must believe the information has indeed been verified. Dun & Bradstreet has an elaborate system for accomplishing this task. When it follows the requirements of its own system, it is extremely unlikely that Dun & Bradstreet could ever be found liable for defamation. (See the discussion of Dun & Bradstreet's common law privilege, Section IV, *infra*.) Thus, although verification is achieved through different means, its importance to subscribers dictates that D&B check information, and indicates a similarity between credit reports and advertising.

#### 2. Credit Report Speech is Hardy.

The key trait shared by advertising and credit reports is hardiness. As discussed earlier, the hardiness issue is critical because it relates directly to the primary rationale of *New York Times/Gertz* — chilling of protected speech. Credit reports are undoubtedly hardy.

In *Central Hudson*, the Court noted that "commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation.'" 447 U.S. at 564 n. 6. "Economic self-interest" is the reason credit reports exist. Dun & Bradstreet attempts to deal with this fact by arguing that it should not forfeit first amendment protection simply because it sells information for a profit. But the "economic self-interest" in credit reports is not simply that of Dun & Bradstreet. The reports are critical to the economic self-interest of Dun & Bradstreet's subscribers and to the subjects of the reports.<sup>15</sup> This demand for credit information ensures the hardiness of Dun & Bradstreet's speech.

**3. Accepting D&B's Narrow Definition of Commercial Speech Would Cause Significant Problems in Other Areas of State Regulation.**

If commercial speech is limited to advertising, and no distinctions can be drawn among speakers and types of speech in defamation cases, the genie will be loosed from its bottle. State and lower federal courts have used the commercial speech doctrine to justify government regulation of what would otherwise appear to be protected first amendment speech. See, e.g., *SEC v. Lowe*, 725 F.2d 892 (2d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3020 (U.S. May 16, 1984) (No. 83-1911) (using commercial speech doctrine as basis for upholding SEC's restriction on investment advisor's newsletter); *Minnesota ex rel. Spannaus v. Century Camera, Inc.*, 309 N.W. 2d 735 (Minn. 1981) (state statutes limiting employer in requiring and disclosing polygraphs is constitutionally valid restriction on commercial speech). This Court has noted that "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456 (1978). Yet acceptance of

15. In fact, Dun & Bradstreet uses the latter factor to help it gather information. It stresses to the subjects of reports that it is in their economic self-interest to provide information to Dun & Bradstreet.

D&B's arguments would call into question numerous regulations, including legislation in the closely related area of consumer credit reports. See *Fair Credit Reporting Act*, 15 U.S.C. §§1681 to 1681t (1976).

The Brief Amicus Curiae of the Information Industry Association suggests even more difficult problems. As the "information industry" achieves high-tech capability, individuals and small companies will face Orwellian-type situations regarding their privacy and reputations. The amici are asking for full constitutional protection for their "industry" before all the implications and complications are known. In the last communications revolution — television — this Court wisely rejected automatic application of traditional first amendment doctrines. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969) ("[D]ifferences in the characteristics of news media justify differences in the First Amendment standards applied to them.").

Finally, the Court should note that the recurring theme in the briefs of D&B and its supporting amici is the difficulty of making distinctions, whether it be toward speaker or speech. Surely, however, a comparison between the concerns that spawned *New York Times*, and the societal value of commercial credit reports reveals that critical differences exist. This Court should heed its own warning:

To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech.

*Ohralik*, 436 U.S. at 456. *Gertz* itself would be an example of the principle. While generally thought of by the press and commentators as a setback on the right to report on matters of public concern, *Gertz* would simultaneously elevate credit report speech and credit reporting agencies to the same level as political debate and the *New York Times*. Reference is made once more to Professor Shriffin — if *Gertz* applies to credit reports, "there is something clearly wrong with the first amendment or with *Gertz*." Shriffin, *supra* note 9, at 1268.

#### IV. THE COURT SHOULD NOT INTERFERE WITH STATE LAW REGARDING CREDIT REPORTS: THE COMMON LAW CONDITIONAL PRIVILEGE PROVIDES ADEQUATE PROTECTION.

The common law provides adequate protections for Dun & Bradstreet. A common law privilege, discussed at Sunward's previous Amicus Brief at 9-12, protects Dun & Bradstreet against not only presumed damages, but basic liability as well.<sup>16</sup> The existence of the common law privilege demonstrates that states faced with the problem have considered and balanced the reputational interests of their citizens against the need for a "free flow" of credit information. The balance achieved by these states generally requires a substantial showing of culpability by the plaintiff on the part of the credit agency. Dun & Bradstreet has not shown why this Court should upset these state determinations.<sup>17</sup>

16. In fact, because of the common law privilege, extension of the principles of *Gertz* to Dun & Bradstreet would result in greater protection in some states for defamatory credit reports than is given other types of defamatory speech. Compare *Gobin v. Globe Publishing Co.*, 216 Kan. 223, 531 P.2d 76 (1975) (private plaintiff can recover compensatory damages from media defendant upon showing of negligence), with *Kansas Electric Supply Co. v. Dun & Bradstreet, Inc.*, 448 F.2d 647 (10th Cir. 1971), cert. denied, 405 U.S. 1026 (1972) (applying Kansas law) (showing of wanton and reckless conduct necessary to establish liability of credit reporting agency).

17. Dun & Bradstreet may respond that the Vermont Supreme Court failed to extend a conditional privilege to credit reports. Given Dun & Bradstreet's failure to show any real risk of chill, and its performance in other states without a privilege, the Vermont decision may be appropriate. However, even if this Court disagrees with the Vermont decision, reversal is not mandated. The trial court required Greenmoss to prove a substantial degree of culpability on the part of Dun & Bradstreet. This Court need not decide the exact level of fault necessary to recover for a defamatory credit report, but only whether the showing made by Greenmoss was sufficient under the Constitution. If the Court disagrees with the Vermont Supreme Court's refusal to extend any privilege, an admonition, such as that in *Gertz*, that the states can set their own standards short of strict liability, would suffice.

A more practical problem involves a jury's ability to differentiate between the common law privilege and the constitutional requirement of "actual malice." A finding of culpability, usually defined in terms of malice, recklessness, or gross negligence, establishes basic liability under the common law in a case involving a defamatory credit report. Under *Gertz* a separate finding of actual malice, defined in terms of serious doubts about the truthfulness of the report, would be needed before presumed or punitive damages could be awarded. Before this Court embarks on a course that would add to the confusion of defamation law, it should consider whether the culpability differences existing between a showing of actual malice, and the showing necessary under the common law privilege, actually would increase Dun & Bradstreet's "breathing space."

When closely scrutinized, Dun & Bradstreet is suggesting that its reporters and information disseminators would feel less chill than they allegedly now do if they were aware that presumed damages would not attach except when they had subjective doubts about the truth. In other words, Dun & Bradstreet's employees find it difficult to breathe the truth under the threat of being held liable for gross negligence, but would feel secure under the subjective doubts test. Such an argument flies in the face of Dun & Bradstreet's training program, which emphasizes the interest in accuracy of both subscribers and those about whom the reports are issued. Indeed, one wonders how much faith a subscriber would place in a Dun & Bradstreet report if it were aware of Dun & Bradstreet's alleged need for greater breathing space in relation to the truth. More importantly, however, given the type of speech in which D&B engages, the increased protection provided by "actual malice" over D&B's common law privilege, would have a negligible impact, if any, on breathing space for protected speech.

**CONCLUSION**

Based upon the foregoing, Amicus Curiae Sunward Corporation respectfully requests the Court to affirm the judgment of the Vermont Supreme Court.

Dated this 23rd day of August, 1984.

Respectfully submitted,

/s/ William E. Murane

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In The  
**Supreme Court of the United States**  
October Term, 1984

—0—  
**DUN & BRADSTREET, INC.,**  
*Petitioner,*  
vs.

**GREENMOSS BUILDERS, INC.,**  
*Respondent.*

—0—  
**On Writ of Certiorari to the**  
**Supreme Court of the State of Vermont**

—0—  
**SUPPLEMENTAL BRIEF OF RESPONDENT**  
**ON REARGUMENT**

—0—  
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## STATEMENT OF THE CASE

### 1. The Facts

The Statement of Facts contained in Greenmoss' initial brief will not be repeated here. However, certain details should be amplified and several misapprehensions of the facts set forth in D & B's Supplemental Brief should be corrected.

Since D & B failed to make any attempt to follow its own internal requirements of verifying with the putative "bankrupt" the truth of the bankruptcy information, Greenmoss learned of the bankruptcy notice by sheer fortuity. The Howard Bank, which was a significant creditor of Greenmoss, advised Greenmoss that it had received the bankruptcy notice during the course of a meeting at which Greenmoss' president was seeking a loan. Greenmoss' previous loan requests with the bank had been granted, but, as Greenmoss' president testified and as the Vermont Supreme Court found, the bank suspended consideration of the loan request because of the bankruptcy report. The uncontested fact is that, despite an otherwise unblemished credit history with the bank, Greenmoss' loan request was rejected and, in close temporal proximity to the bankruptcy notice, the bank requested Greenmoss to take its banking business elsewhere. After the rejection of credit by The Howard Bank, Greenmoss was able to set up a banking relationship with the Chittenden Trust Company with little apparent difficulty. The Chittenden Trust Company was not a subscriber to the D & B service and had no knowledge of the bankruptcy report. These facts evidently were important to the jury since during deliberations the jury asked whether the Chittenden Trust Company had any knowledge of the bankruptcy report. (Tr. 495-96, 498-99).

D & B's assertion that none of the recipients of the special notice of bankruptcy was a "customer" of Greenmoss, avoids the fact that, conceivably worse from Greenmoss' standpoint, each of the recipients of the report was a creditor and The Howard Bank was Greenmoss' "life blood" creditor since it was Greenmoss' primary bank.

The evidence yields some insight into the service D & B provides. D & B does not open its credit reporting service to the public at large. In fact, only those whom D & B feels are "legitimate business concerns" can qualify as subscribers. (Tr. 346). Attorneys at law, for example, cannot, according to D & B's own witnesses, be subscribers. (Tr. 346). Even a "legitimate business concern" cannot buy a single D & B report on one customer but must instead buy an entire subscription service. (Tr. 346-47, 373-74). It is a requirement of the contractual arrangement with D & B and the subscriber that the subscriber hold the information it receives in confidence. (Tr. 349). A sample of D & B's subscription service agreement is set forth in Appendix A to the Amicus Curiae Brief of Sunward Corporation. With the exception of one industry (the apparel industry) D & B offers no recommendation or opinion in its reports about the creditworthiness of those about whom it reports. (Tr. 357-58).

Thus, this case involves defamatory statements made not to the public at large with whom Greenmoss may have had no dealings but rather very specific and precise factual information, on its face devoid of opinion or analysis, from a major force in the business credit reporting industry purposefully directed at those with whom Greenmoss had a present and continuing relational interest. There is here, unlike previous cases before the Court, relevant relational communications of fact made through "pri-

vate" channels rather than through "public" channels by a speaker motivated solely by profit incentive which is in the business of selling such reports to private subscribers whom it screens in advance according to its own standards of legitimacy.

Greenmoss' case focused on the manner in which D & B collected the information about the bankruptcy, the economic harm wrought by the notice and, in an approach apart from the defamation, D & B's conduct toward Greenmoss after the defamation.

Although Greenmoss never solicited a D & B rating, its ratings had steadily improved prior to the bankruptcy notice. Indeed, the last report which D & B had on file concerning Greenmoss prior to the bankruptcy notice showed Greenmoss as having a net worth of \$30,000 with \$122,000 in assets and \$93,000 in *secured* liabilities. D & B knew Greenmoss had a "clear history" and a "good relationship" with its bank. The report of bankruptcy presented gross deviations from these facts since if the report were to be taken as true, not only did the assets go down by almost \$96,000 but the liabilities, which D & B knew were *secured*, also went down by some \$56,000. When both assets and *secured* liabilities diminished by such dramatic amounts, there were apparent reasons to doubt the veracity of the "correspondent" and to conclude that the allegations of bankruptcy were inherently improbable.

The failure to attempt prepublication verification involved more than a mere failure to investigate; it demonstrated a failure to observe previously established systems for assessing the reliability of one source of information.

D & B offered no evidence that the verification procedure, if followed, would in any way delay circulation of the report. There was no evidence that the bankruptcy

report was analyzed by D & B's supervisory personnel or subjected to any editorial or analytical process prior to its publication.

D & B broadly suggests that there was "no" evidence of a causal connection between the defamatory report and Greenmoss' lost profits. This conclusion is not borne out by the record. Greenmoss' president testified extensively as to the absence of any reasons other than the bankruptcy notice for Greenmoss' lost profits. He also testified concerning the absence of reasons other than the bankruptcy notice why The Howard Bank would sever its relationship with Greenmoss. Additionally, the timing between the bankruptcy notice and Greenmoss' loss of the bank's credit relationship in the face of a clear prior history was before the jury.<sup>1</sup>

Greenmoss presented damage claims based on lost profits and out-of-pocket expenditures made to correct the harm caused. Thus, more intangible compensatory damages permissible under *Gertz*'s ambit of actual damages such as impairment of standing in the community and humiliation were not the basis for recovery. *Gertz v. Robert Welch*, 418 U.S. 323, 350 (1974). D & B engaged in extensive pre-trial discovery and disclosure of the factual basis for Greenmoss' claims and did not claim surprise at trial. It had unfettered cross-examination of Greenmoss' lost profits analysis and chose to call no witnesses on its own to rebut or question Greenmoss' figures.

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<sup>1</sup>D & B's assertion that Greenmoss did not call any of the recipients of the bankruptcy notice is misleading. The facts are that, as a courtesy to D & B, Greenmoss allowed it to call a Howard Bank officer to testify during Greenmoss' direct case (Tr. 210). Greenmoss' cross-examination of that witness and the documentary evidence submitted through him supplanted any need to call other Howard Bank employees to substantiate Greenmoss' position.

The trial Court specifically found the evidence was sufficient to create issues of fact for the jury concerning both liability and damages and the Vermont Supreme Court upheld that determination. (J.A. 25, 43-46).

The charge D & B finds objectionable is reprinted at pages 17-21 of the Joint Appendix. That it should be construed as a whole rather than in piecemeal fashion is axiomatic. There are, however, significant features of the charge which D & B does not highlight. The methodological formula of the charge was to instruct that the facts contained in the bankruptcy notice constituted libel "as a matter of law" (J.A. 17) unless the jury concluded that D & B was "privileged to make that report and publish it to subscribers." (J.A. 17-18). The privilege granted D & B was the special common law privilege extended only to credit reporting agencies and not available to other defamation defendants. Greenmoss was assessed the burden of surmounting the barrier of the privilege and if it failed, no plaintiff's verdict could be recovered. On two occasions, the jury was specifically advised that *mere negligence* was not a high enough standard to supersede the privilege and a higher category of fault was needed to return any verdict for the Plaintiff. (J.A. 18-19). It was only if the jury found that Greenmoss' proof defeated the privilege that damages could then be considered. (J.A. 19). It is noteworthy that the Court instructed the jury concerning a *defendant's* verdict and provided both a plaintiff's and defendant's verdict form. (Tr. 490-91). If this litigation was, in fact, a case of presumed damages assessed without regard to fault, a defendant's verdict would be precluded.<sup>2</sup>

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<sup>2</sup>At the conclusion of the charge, the Court again admonished the jury that it was not mandatory that it consider the question of damages (Tr. 491).

To support its contention that the compensatory damage award was somehow based on presumption, D & B claims that the evidence of lost profits and expenditures caused by D & B's wrongdoing total only \$36,000 instead of the \$50,000 awarded by the jury. (Brief of Petitioner 7-8). This claim fails to consider that the charge also provided the jury the right to award a sum in lieu of interest, as is permitted under Vermont law, on the damages found from the time of injury, July 26, 1976, to the date of the verdict, April 10, 1980. (Tr. 491). A sum in lieu of interest could be awarded, under the language of the charge, at the Vermont statutory rates of 8½% per annum until July 1, 1979 and then at 12% per annum from July 1, 1979 to the date of the verdict. (Tr. 491). Even under D & B's calculation of the actual damages at \$36,000, consideration and calculation of interest, when added to the damage figure asserted by D & B, yields a total compensatory damage figure, as of the date of the verdict, of approximately \$50,022.30. This is virtually the amount awarded by the jury for compensatory damages which the trial Court referred to in its charge as "actual" damages.

Secondly, D & B's analysis of the components of the compensatory award is limited to consideration of lost profits for only a one-year period. Greenmoss introduced evidence that the lost profits in the succeeding year were an additional \$42,000. (Tr. 99, 104).

The Court precluded an award of substantial damages unless the jury was persuaded by a preponderance of the evidence that substantial damages had "*in fact* occurred". (J.A. 19). The next sentence of the charge suggested a verdict of nominal damages "such as one dollar" unless Greenmoss proved damages that were "*actually caused*" by the Defendant. (J.A. 19). We, therefore, disagree with the characterization of the charge

that it gave the jury full discretion to award damages in whatever amount it chose.<sup>3</sup>

D & B's reference to the amounts asserted in the *ad damnum* of Greenmoss' Complaint is most curious. Aside from the fact that in Vermont, as elsewhere, the amount asserted the *ad damnum* clause is not relevant to any issue aside from the jurisdictional prerequisite of the court where the action is filed,<sup>4</sup> there are cogent reasons, as set forth in Appendix A, for a non-inflammatory *ad damnum* in a case such as this.

The post-defamation conduct of D & B was a focal point of this trial. D & B did not object on any grounds, including relevance, to the introduction of this testimony. After Greenmoss' fortuitous discovery of the defamation, it located, after some difficulty, the D & B office responsible for circulating the report. Greenmoss' efforts to obtain an effective, unambiguous corrective report, its objections to the form of the corrective notice sent by D & B, its frustrations in obtaining the identity or even the number of business entities who received the report and other dealings between the parties functionally separate from the circulation of the bankruptcy notice are outlined in Greenmoss' Brief at pages 2-5. D & B's witnesses admitted that they knew at the time of the initial discussions with Greenmoss and thereafter the entities to whom the reports had been sent. (Tr. 450-51). D & B never offered a rationale for refusing to provide this

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<sup>3</sup>Gertz establishes the rule that for actual damages there need be no evidence which assigns an actual dollar amount to the injury. 418 U.S. at 350.

<sup>4</sup>The amount of damages alleged in the Complaint is "not a standard for estimating the damages". *Dupona v. Benny*, 130 Vt. 281, 284, 281 A. 2d 404, 407 (1972). In recognition of such considerations, the plaintiff in *Gertz v. Robert Welch, Inc.*, sought, in his action filed in Federal Court, the sum of \$10,001 in actual damages. See, Anderson, *Libel and Self-Censorship*, 53 Tex. L. Rev. 422, 442 n. 88 (1975).

information but acknowledged at oral argument before this Court that this practice has been discontinued. Businesses which are the subject of false reports by D & B are now given this information. (Tr. Oral Argument, March 21, 1984 at 28).

The Court's instructions on punitive damages explained the rationale for such damages and advised the jury to consider the conduct of the Defendant both before and after the publication in considering whether punitive damages were appropriate. Any steps to mitigate Greenmoss' damage were to be considered by the jury on the threshold question of *whether* to award punitive damages, not on the question of what amount of punitive damages should be awarded.

Finally, Greenmoss takes very strong exception to D & B's comparison of the charge in the instant case with the charge before the Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964). Among other things, the trial Court in this case never advised the jury that malice was presumed. Quite to the contrary, proof of malice was part of Greenmoss' burden. Secondly, the verdict slips were crafted with the cooperation of counsel so that, in clear contrast to the instructions before this Court in *New York Times*, in the event of a plaintiff's verdict, punitive damages could not be awarded without a finding and verdict of compensatory damages. (Tr. 490-91 and Jury Verdict Tr. 502).

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#### SUMMARY OF ARGUMENT

The rules in *Gertz* were fashioned to apply solely to the media. To extend these rules to non-media defendants would improperly deprecate reputational interests and would protect all speech irrespective of whether the communication has any constitutionally recognized value

whatsoever. *Gertz* should be viewed in the context of its contribution to the purposes of the First Amendment enunciated in *New York Times*; to protect public debate about public issues. The expansion of *Gertz* to non-media defendants to protect all of their speech is not appropriate.

Totally apart from *Gertz*, this case should be viewed as a commercial speech case. The principles behind the commercial speech doctrine are fully applicable here. A holding that this speech is commercial speech would be a positive contribution in the development of the commercial speech doctrine. A holding that it is not commercial speech would have untoward consequences for the regulation of commercial activity.

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#### ARGUMENT

##### I. The Constitutional Rule Of *New York Times* And *Gertz* With Respect To Presumed And Punitive Damages Should Not Apply Where The Suit Is Against A Non-Media Defendant.

##### A. The Rational For The *Gertz* Limitations Preclude Its Application To Non-Media Defendants.

D & B has stood the *Gertz* and *New York Times* balancing approach on its head. D & B's analysis *begins* with its dislike of common law rules and proceeds directly to the tension *Gertz* and *New York Times* recognize between those rules and the First Amendment.

In so doing, it has avoided the tougher question of whether the First Amendment applies where the speaker is not a media speaker and the plaintiff is not a public official or public figure. It is basic to any analysis of these issues to recognize that *Gertz* set down broad principles of general application. 418 U.S. at 343-44. The applica-

tion of *Gertz* to non-media defendants must, therefore, be discussed in terms of those broad principles.

Consistent with the balancing approach utilized in First Amendment methodology, D & B must identify a valid First Amendment interest *before* consideration of the state's interests in reputational protection and the wisdom of the common law is relevant. We submit that such a showing has not been made in this case.

Greenmoss' earlier brief discussed the absence of relevant First Amendment interests in non-media defamation. Respondent's Brief at 30-33.

The true radicalism of D & B's approach can be seen by the development of the Court's cases prior to *Gertz*.<sup>5</sup> The Court announced in *New York Times* that the central meaning of the First Amendment in the context of defamation is that public debate about public issues should be uninhibited, robust, and wide-open. In a preliminary step to ensure this result, the Court erected a constitutional privilege protecting good faith critics of the official conduct of public officials from defamation suits. In the decisions which followed, the constitutional privilege was extended to defamation of public figures involved in public issues and ultimately (by a plurality) to defamation of private individuals involved in a matter of public concern. Each of these extensions was an expansion of the con-

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<sup>5</sup>D & B's syllogistic, result oriented argument basically decries the fact that it is not subject to the same rules as other defamation litigants. If the Court extends D & B protection on that basis, it would take little ingenuity for public figures or public officials to challenge the rules concerning the constitutional barriers they face in defamation actions on the grounds that they are subject to different constitutional disabilities than private plaintiffs if they commence defamation actions. The common ground of both arguments is that certain classes of litigants receive different treatment under the First Amendment than do others. As we point out *infra*, this is a specious argument.

stitutional privilege toward the boundaries of the First Amendment theory enunciated in *New York Times*. Each was designed to protect public speech on matters of public concern and each preserved traditional state remedies where the speech at issue was not of public concern. See Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349, 1412 (1975).

By abandoning the "matter of general or public interest" standard of *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971), the various rules announced by the majority in *Gertz* relating to private defamation plaintiffs apply even when a private individual has been defamed by a media communication which is of no public interest whatever. The rules in *Gertz*, we submit, were clearly meant to apply in defamation suits only against the press. Eaton, *supra*, at 417. *Gertz* is within the rationale of *New York Times* and its progeny only when its holding is limited to the media and when one applies to *Gertz*, in the aftermath of *Rosenbloom*, the consideration that the news media ought not to be put to the task of assessing whether a court would ultimately find its news report to be in the public interest or of private interest only. The difficulty of making such a determination by those who do not necessarily have any self-interest in the speech itself could cause the media to steer wide of the unlawful zone, resulting in self-censorship on matters in the public interest. In order to insure that state law does not suppress information concerning matters of public concern, *Gertz* found it necessary to provide constitutional protection for information in the media which may be of minimal public interest. Eaton, *supra*, at 1415 and n. 264. It announces, in that sense, very broad prophylactic rule.

An analysis of *Gertz* which brings its rationale into harmony with the consistent development of First Amendment doctrine is that *Gertz* extends the coverage of the First Amendment to public speech. See Eaton, *supra*, 1408, 1412-18, Tr. Oral Argument, 36. *Gertz* is an enunciation of the precept that public speech is what is at issue when First Amendment claims are made in defamation cases. Using the "broad rules of general application" approach, the one who typically and generally engages in public speech and thus is worthy of constitutional protection, *Gertz*, *supra*, at 343-44. Speech concerning public officials and public figures is public speech and, therefore, entitled to the constitutional privilege of *New York Times*. Speech on a matter of legitimate public concern, i.e. one which is relevant to the business of governing or to the functioning of democratic institutions should also be categorized as public speech. See Eaton, *supra*, at 1408; Lewis, *New York Times v. Sullivan Reconsidered: Time To Return to the Central Meaning of the First Amendment*, 83 Colum. L. Rev. 603, 622-623 (1983). Private speech such as limited communications or private conversations not touching on issues of the business of government would be left to the evolution of state defamation law.

Whether speech is relevant to public affairs, i.e. whether it is public speech, must always be a critical question in determining the level of constitutional protection in libel actions. This is different than saying that such speech is of general or public interest. Analyzing *Gertz* as part of the continuing evolution toward protecting public debate about public issues from self-censorship reaction would not, in any sense, resurrect the public or general interest test of the *Rosenbloom* plurality because it would not permit the *New York Times* shield to extend to mere

public curiosity about private matters and would not permit public speech to equal "newsworthiness" or permit mere dissemination of information, by its own force, to bootstrap the disseminator into the "majestic protection of the First Amendment". Kalven, *The Reasonable Man and the First Amendment: Hill, Butts and Walker*, 1967 Sup. Ct. Rev. 267, 284; Eaton, *supra*, at 1402-03; Lewis, *supra*, at 624. Considering *Gertz* in such terms and focusing upon the speech before the Court in *Gertz* would retain fidelity to the original concern that brought the Constitution into the area of defamation in 1964: protection for the function of the "citizen critic of government". *New York Times v. Sullivan*, 376 U.S. at 282.

As the *Gertz* majority believed, there is a need to have a far brighter line than speech "in the general or public interest." But considering *Gertz* as creating a dividing line between public speech and private speech in terms of its nexus to public affairs is a meaningful line. Certainly on the facts of *Gertz* (article about a nationwide communist conspiracy) relevance to the appropriate functioning of our democracy was apparent.

Since values of reputation and speech both command respect, however, lines will have to be drawn somewhere. See Lewis, *supra*, at 624.

Line drawing is what the Court must do in this case lest by expanding *Gertz*, it broadens *New York Times* beyond even the limits of *Rosenbloom*. The goal is to draw lines which permit analytical distinctions based on principles that do not admit of partisan bias. The fact that such lines must be drawn is not a valid reason to abandon the inquiry in the first place. As Mr. Justice Holmes put it "where to draw such lines is the question in pretty much everything worth arguing in the law". *Irwin v. Gavit*, 268 U.S. 161, 168 (1925).

In a related area the Court has recently held that the protection afforded public employees extends only to speech of such employees in their employment capacity which is addressed to matters of legitimate public concern. *Connick v. Meyers*, 103 S. Ct. 1684 (1983). Statements which do not touch on such matters may be considered unprotected speech in the sense that employment related sanctions may be imposed on the basis of such statements. *See Bose v. Consumers Union of United States, Inc.*, 104 S. Ct. 1949, 1962, n. 22 (1984).

The public nature of media communication within the broad genre-based generalities which predicate the majority opinion in *Gertz* justifies extending First Amendment protection to it. The first remedy for false media speech is not silence but more speech. Objectionable public statements via the media generally may be countered with "more speech". This is not usually the case with respect to non-media speech where the fact of the communication itself may not be known until it is too late to counter it by corrective speech or other action. See Nimmer, *Is Freedom of the Press a Redundancy? What Does It Add to Freedom of Speech*, 26 *Hast. L. J.* 639, 656 (1975).

In support of the proposition that the *Gertz* doctrine should be limited to media expression, Professor Nimmer also points out that defamatory statements appearing in the media generally consist of expressions by persons not themselves connected with the media identified in the media as "news". In such circumstances, the speech values of self-fulfillment and, to some extent, democratic dialogue and safety valves which pertain to the speech of the person quoted are combined with the considerable democratic dialogue press interest. Together, these may be said to outweigh the counterinterest in reputation. Nimmer, *supra*, at 655.

The balance might shift in favor of reputation if the democratic dialogue press interest is removed as would be the case in non-media defamatory speech. These considerations emphasize the public nature of the press as against the more personal or private nature of typical non-media speech.

This is not to say that there are not non-media speakers who speak out on public issues. It is to say, however, that a case such as *Gertz* which was specifically crafted and developed to deal with the media should not, solely in the interest of symmetry, be used as a springboard to apply the *New York Times* doctrine to all speech whether media or non-media. To do so would be to do violence to the *New York Times* doctrine. Paradoxically, it would even do violence to the theory of the plurality in *Rosenbloom* since, if the first question presented by this Court's July 5, 1984 Order is answered in the affirmative, the *New York Times/Gertz* rule will apply irrespective of whether the speech is in the public or general interest. There is an unsettling irony in the ruling sought by D & B and in the contention that the constitutional rule of *New York Times* and *Gertz* with respect to presumed and punitive damages should apply where the suit is against a non-media defendant irrespective of any other considerations. As Justice Rehnquist commented in *Bose v. Consumers Union of the United States, Inc.*, *supra*:

It is ironic . . . that a constitutional principle which originated in *New York Times v. Sullivan*, 376 U.S. 254 (1964) because of the need for freedom to criticize the conduct of public officials is applied here to a magazine's false statements about a commercial loud speaker system.

104 S. Ct. at 1967-68. Secondly, many commentators have concluded that *Gertz* constituted a retrenchment in First

Amendment theory and brought to a halt the momentum of a more expansive extension of *New York Times*. See Anderson, *Libel and Self-Censorship*, 53 Tex. L. Rev. 422, 451-52 (1975); Brosnahan, *From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel and the First Amendment*, 26 Hast. L. J. 777, 789-90 (1975). *Gertz* and subsequent cases have been identified as a departure from the *New York Times* approach of focusing on the demands of the First Amendment and instead focus on the legitimate state interests in the law of defamation. Brosnahan, *supra*, at 787. In terms of the protection of the First Amendment, *Rosenbloom* can be seen as the highwater mark in the expansion of the First Amendment in the defamation area. Although *Rosenbloom* has been criticized for permitting varying determinations of what is and what is not of general or public interest, the lower courts did develop under *Rosenbloom* only one clear category of communication that was not deemed to be within the *Rosenbloom* test: false credit reports. Ingber, *Defamation; A Conflict Between Reason and Decency*, 65 Va. L. Rev. 785, 840 at n. 242; Eaton, *supra*, at 1402, n. 223. See also, Brief of Respondent at 17-18 and cases cited therein. Consequently, if D & B is correct and this Court's July 5, 1984 question is answered in the affirmative, all speech of whatever nature will be protected under the *Times/Gertz* doctrine irrespective of whether it is public or private or whether it is speech in the general or public interest. Greenmoss submits that *Gertz* was never intended to countenance such a result and its doctrine only has application where the defendant is a non-media defendant.

Even if First Amendment interests recognized by this Court in the defamation context can be applied to non-media defendants within the doctrinal caveat of *Gertz* that broad rules of general application must be estab-

lished,<sup>6</sup> the demands of the First Amendment must then be weighed against legitimate state interests in the law of defamation. This concern is not merely rooted in respect for the common law but recognizes a profound concept of federalism that the protection of "private personality" is constitutional in dimension since it is left to the individual states under the Ninth and Tenth Amendments. *Gertz*, *supra*, at 341. The Court's high regard for reputation highlighted in *Gertz* is re-emphasized in *post-Gertz* cases dealing with public officials and public figures. See *Hutchinson v. Proxmire*, 443 U.S. 111, 119, n. 8, 135-36 (1979); *Wollston v. Readers Digest Assoc.*, 443 U.S. 157, 167-69 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976).

In the instant case, the defamation was directed to and constituted an invasion of presently, and previously existing relational interests which Greenmoss had with each and every recipient of the false credit report. All of the recipients of the report were entities with whom Greenmoss had business relations, for example, the insurance company which held Greenmoss' "key man" and shareholder's redemption insurance and the company which issued credit cards to Greenmoss. By the nature of its business, D & B either knew or had a high probability of knowing that these entities were creditors of Greenmoss. Consequently, we have an instance which graphically shows that damage inflicted by the thrust of the dagger may wound more mortally than the swipe of the broad axe. For this reason, we strongly disagree that the dissemination of def-

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<sup>6</sup>The Court has repeatedly recognized that each medium for communicating ideas and information presents its own particular problems and, therefore, analysis of First Amendment concerns implicated by a given medium must be sensitive to these particular problems and characteristics. See e.g., *Members of the City Council of the City of Los Angeles v. Vincent*, (Brennan, J. Dissenting) 104 S. Ct. 2118 (1984).

amation to a small number of individuals renders less significant the state interest in protecting against injury to reputation. On the contrary, we claim that the state's interests may be higher where the defamation reaches those with an established relational interest with the victim than where the defamation reaches those to whom the plaintiff is unknown. *cf.*, Prosser, *Law of Torts*, §111, p. 743, n. 89, 744 (4th Ed. 1971).

The states, through the common law of defamation, also recognize that when the defamation is about certain defined categories, for example, the insolvency of a business, the intuition that harm has occurred coincides with common experience and reality. Prosser, *supra*, at 762-65.

Problems of proof are especially difficult in cases involving businesses. As the Colorado Supreme Court put it, "the rationale for the presumption of damages derives from the difficulty of proving damages in these instances":

This is particularly true where the defamatory remarks relate to the conduct of an individual's business affairs. It is the rare case in which a slander will destroy business profits in such a way that the loss can be directly traced to the slanderous remark. *See Rowe v. Metz*, 579 P. 2d 283, 284 (1978).

There are other problems of proof which bear mentioning here. D & B's contracts with its subscribers bar revelation of D & B to anyone as a source reference. Secondly, business people are, for many reasons, reluctant to discuss the reasons why business decisions are made. Also, it is the rare businessman who will testify in court that his relationship toward the plaintiff changed as a result of the publication when by doing so he admits that he changed his opinion of the plaintiff without determining the truth or falsity of the statement. Eaton, *supra*, at 1357-58. Thirdly, in the diversity of American business, it is difficult to actually locate with the limited resources available

to a typical private plaintiff, all the individuals, even in one organization, who made or participated in the decision to withhold credit and present that testimony in an acceptable evidentiary form.

*Gertz* should not be read as barring the presumption that the defamation has proximately caused the loss or the presumption that *some* damage has occurred. Justice Powell's decision in *Gertz* calls into question only the states' interest in awarding substantial sums of money without any proof that such harm has actually occurred. Where the states' interests in compensating private individuals for reputational damage have a strong place, not explored by *Gertz*, is in making the causal link between demonstrated injury and the defamation, i.e., overcoming the plaintiff's most difficult proof problems of tracing demonstrable loss to the defamation. It is in the causality link and in bridging the proximate cause gap between the loss and the defamation that creates the problem for the defamed victim. This state interest is most legitimate and even if identifiable First Amendment rights extend to non-media defendants, this interest should outweigh the First Amendment interest.

Thus considered, the instant case is wholly different from *Gertz*. In *Gertz*, as Judge (now Justice) Stevens' opinion for the Seventh Circuit Court of Appeals points out, the plaintiff offered *no proof of actual damages at all*. *Gertz v. Robert Welch, Inc.*, 471 F. 2d 801, 804 (7th Cir. 1972), *Rev'd.*, 418 U.S. 323 (1974). Additionally, it does not appear that the jury in *Gertz* received any instruction concerning any common law privileges.

In *Greenmoss*, a three tiered progression preceded the verdict. The first tier was for the plaintiff to recover at all. To do this, more than mere negligence had to be

shown. If Greenmoss' proof met the test established by the trial Court, it was then entitled to some nominal amount of compensatory damages. The Court suggested one dollar as this amount. (J.A. 19).

The second tier for Greenmoss was to recover substantial compensatory damages. Compensatory damages were limited to lost profits and expenditures proximately caused by D & B's wrongdoing. Greenmoss had to prove that these damages "have in fact occurred" and were "actually caused" by the defendant. (J.A. 19). The quantum of proof for these two tiers was the preponderance of the evidence standard.

The third tier was punitive damages. Any punitive award could not be based on a presumption nor even on a preponderance of the evidence test but "on the basis of clear and convincing evidence". (J.A. 20). A failure to meet the proof required by the first tier would have meant a defendant's verdict and a form for such was provided to the jury by the trial Court. The punitive damage award did not focus on the speech but required the jury to assess whether "there has been outrageous conduct" (J.A. 21) or "actual malice". (J.A. 20). D & B's speech was not singled out for punitive damage treatment but rather "the conduct of the defendant both before and after the publication" was to be considered. (J.A. 20). As we have argued earlier, the punitive damages in this case were awarded for conduct entirely separate from the speech. (Brief of Respondent at 40-41). Therefore, the activity or conduct regulated in this case was not the speech itself. *cf.*, Brief of Dow Jones & Company as Amicus Curiae, at 10 and n. 4. After the requisite showing of fault has been made, *New York Times* and its progeny do permit presumed and punitive damages. *See* Eaton, *supra*, at 1386-90 and cases cited therein.

Considerations of federalism and the power and rights of the states must also be considered here since the necessary implication of an affirmative answer to the initial question posed by the Court and to the questions presented in D & B's petition will be to apply the First Amendment in all defamation litigation regardless of the status of the parties or the nature, character or viewpoint of the speech. The ruling sought by D & B effectively constitutionalizes all state laws of defamation and displaces the development of the common law. *Gertz's* expansion beyond non-media defendants could make all conditional common law privileges obsolete. Anderson, *supra*, at 443 and n. 97. The inappropriateness of such a standard for restricting both state and nation with respect to purely private defamation<sup>7</sup> not involving public speech is indicated by the disparity between state and federal functions and duties in relationship to freedoms of speech. *cf. Beauharnais v. Illinois*, 343 U.S. 250, 294-95 (1953).

The federal-state allocation of power in the Constitution reserves residual power to the states to regulate speech deemed injurious to person and property. *Gertz, supra*, at 341. Federally imposed standards, constitutional or otherwise, by their nature, create uniformity and leveling which may diminish the diversity that is conducive to new ideas. The plan of the framers of the Constitution was to enhance liberty by weakening government. To divide power is to weaken it and government power over speech is diminished as it is fragmented among the states. *See* Mayton, *Seditious Libel and the Lost Guarantee of Freedom of Expression*, 84 Colum. L. Rev. 91, 131 (1984).

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<sup>7</sup>Purely private defamation, as used herein, signifies litigation involving a private plaintiff against a private, i.e., non-media defendant, where the issue does not involve public speech.

This would appear to be especially true where, as here, Vermont's regulation of this speech is viewpoint neutral. Professor Shiffrin sums up the point well when he says:

Consider, for example, the case of a commercial supplier of credit information that defames a person applying for credit. *If the First Amendment requirements outlined in Gertz apply, there is something clearly wrong with the First Amendment or with Gertz.* The interests in individual self-expression, autonomy and the like are not present here or are present only in an attenuated way. The *constitutional* interest in affording strategic protection to these defamatory falsehoods in order to encourage investment in credit information suppliers is not impressive. *Nor are there general grounds for concern about government bias. Affording constitutional protection here would trivialize the First Amendment.*

Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 Nw. U. L. Rev. 1212, 1268 (1984) (emphasis added).

This case presents a graphic example of the state's interest in punitive damages since D & B's practice of refusing to reveal the scope of the defamation was halted as a result of this litigation. But even if the First Amendment should apply here, it does not follow that the *Times* actual malice standard should be used for punitive damages. A sufficiently high standard was applied here to protect the minimal constitutional interests at stake.

#### **B. Considerations Of Self-Censorship Are Largely Absent With Non-Media Defendants.**

Where the news media is involved, the majority in *Gertz* felt it necessary to extend First Amendment protection to avoid intolerable self-censorship even where the speech is of no public interest whatsoever. In arriving at this conclusion, the Court analyzed the common law

defenses available to media defendants and concluded that such defenses did not provide the media with sufficient protections against self-imposed restraints. *Gertz, supra*, at 340-42, 350. The specific fear expressed was that the concepts of presumed and punitive damages will be used selectively by juries to punish "unpopular views" and "unpopular opinion". *Id.* at 349, 350. Thus considered, the self-censorship fears derive not from the utilization of false facts themselves but from the use of those facts to advance a controversial or iconoclastic viewpoint or thesis. As will be pointed out *infra*, Dun & Bradstreet's speech is viewpoint neutral. The inquiry in this case must therefore focus on whether the threat of defamation liability will cause such self-censorship by non-media defendants and this Defendant in particular to extend the prohibition of *Gertz* against presumed and punitive damages to them. The question should not be whether there will be any self-censorship. The inquiry is twofold. First, whether there is a likelihood of self-censorship in non-media defamation and second, whether the perceived degree of self-censorship for this class of litigants is intolerable.

The Court's discussion of the dangers of self-censorship in *Gertz* refer exclusively to the press and broadcast media and do not address this concern in the case of other types of defendants. See Anderson, *Libel and Self-Censorship*, 53 Tex. L. Rev., 422, 442-43 n. 95. We posit that self-censorship is not a significant fear with non-media defendants. It is unlikely that this class of defendants will voluntarily squelch or modify their own speech in advance or decide not to speak at all because of the fear of defamation suits.

The *Gertz* majority felt it necessary to lay down broad rules of general application to defamation actions but recognized the fact that not all of the considerations

which justify adoption of a given rule will obtain in each particular case. *Gertz, supra*, at 343-44.

Consistent with that approach, from a generic standpoint it can be concluded that media speakers are more likely to be deterred by defamation actions than are non-media speakers. First, non-media defendants generally have greater protection under state common law privileges than do media defendants. Franklin, 1980 *American Bar Foundation Research Journal*, 457, 471.<sup>8</sup>

Media speakers are comparatively more likely to be aware of the libel laws since they have continuous access to legal advice, they are comparatively more likely to have financial resources sufficient to make them attractive defamation defendants and are comparatively more likely to cause the kind of damage which would encourage defamation suits in response.<sup>9</sup> Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 U.C.L.A. L. Rev. 915, 933 (1978).

The typical media speaker may be unable to limit its communication to a small number of people. Indeed, such limitations may be contrary to its purpose. The typical non-media speaker, in contrast, can limit its communication to a select few. Note, *First Amendment Protection Against Libel Actions: Distinguishing Media and Non-Media Defendants*, 47 So. Cal. L. Rev. 902, 926 (1974).

Additionally, the heightened awareness and consciousness of media speakers to defamation is lacking in a typical non-media speaker. This may, of course, be a more

<sup>8</sup>The jury instructions in this case demonstrate that point since D & B received protection rooted in common law that perhaps no other defendant, media or non-media, would have received.

<sup>9</sup>The Franklin study points out that in non-media defamation cases, the defamation claim is often ancillary to other theories. Franklin, *supra*, 481-87.

subjective deterrent than an objective one, but the media speaker, perhaps because of the media's own emphasis about the issue of defamation, may feel confronted with only two choices; to publish or to remain silent. Thus, with a media defendant, the dragon of self-censorship may be a creature of his own construction whose appetite grows in inverse proportion to the degree of the media speaker's self-interest in the topic. In contrast, a non-media speaker may not confront the self-censorship issue, or having confronted the issue, conclude that it is not a meaningful consideration or, even if meaningful, believe that his self-interest in the speech outweighs any inducement for self-censorship.<sup>10</sup>

A defamed plaintiff's practical problems of proof may also embolden non-media speakers to engage in speech which is defamatory. In media defamation, it is rare when the identity and source of the defendant as the defamer is unknown or proves difficult to obtain.<sup>11</sup> The media by its very nature is open, public and exposed. Their publications are presented for all to see or read. Non-media speakers, as a class, do not have such exposure and vulnerability. As the court in *Grove v. Dun & Bradstreet*, 438 F. 2d 433 (3d Cir.) cert. denied, 404 U.S. 898 (1971) pointed out, in certain non-media defamations the source or nature of the defamation may never be exposed. *Id.* at 437. Witnesses, especially businessmen or those who extend credit may be reluctant by their nature and by fear of their own liability for acting on the basis of false infor-

<sup>10</sup>It has also been suggested that the protection for media defendants may be justified because these speakers serve a different function than non-media speakers and are subject to internal restraints. See Note, *First Amendment Protection Against Libel Actions, Distinguishing Media and Non-Media Defendants*, *supra*, at 929-938.

<sup>11</sup>We have pointed out previously that the common law recognizes the difficulty in proof in tracing business loss to a particular defamatory remark. See *Rowe v. Metz, supra*.

mation to candidly admit their reliance upon a falsehood. The non-media speaker, especially if it has strong economic incentives to disseminate the material, also has the opportunity to restrict its recipient's use of the information or to contractually bind its audience to non-disclosure. The news media cannot use such devices and in any event, such use would be self-defeating and probably ineffective. Many non-media speakers may therefore conclude that they might never be identified as the source of a defamation or even if identified, the victim may have significant problems of proof. These considerations may lessen fears of self-censorship for non-media speakers.

The concept of chilling First Amendment speech is more applicable to the institutional media which, when faced with questionable statements or opinions, will simply not publish the material. The media simply does not have the incentive, economic or otherwise, to publish anything that might lead to a libel suit. Anderson, *supra*, at 433.

The argument has been made that newspapers, magazines and broadcasting companies are businesses conducted for profit and like any other enterprise that inflicts damage in the course of performing a service highly useful to the public, like providers of food or transportation, they must "pay the freight". See *Buckley v. New York Post*, 373 F. 2d 175, 182 (2d Cir. 1967); cf. *Gertz*, 418 U.S. at 390-91. We submit there is a flaw in the analogy of the above argument. The flaw is that the other enterprises mentioned have no choice but to accept the additional risks of liability if they are to continue their profit making activities. In contrast, publishers and broadcasters, i.e. the media, can avoid liability without discontinuing their activities or reducing their profits by simply ceasing to carry or publish the material that creates the risk of

liability, i.e., increasing their self-censorship. Anderson, *supra*, 432 n. 52.<sup>12</sup>

When a non-media defendant speaks out on an issue of political or governmental import in a manner which gives a plaintiff standing to assert a defamation claim, the typical defamation plaintiff in this context would be a public official or a public figure and thus subject to the New York Times rule even as to compensatory damages. See e.g. Eaton, *supra*, at 1406.

Turning to the status of D & B in this action, we do not believe that D & B can legitimately advance self-censorship arguments. Indeed, any self-censorship argument advanced by it seems to center on the claim that absent a constitutional privilege, their information will have to be checked more carefully. (Tr. Oral Argument 7-8). We do not believe that this is the type of self-censorship considered by the Court in *New York Times v. Sullivan* or *Gertz*. Even assuming for purposes of argument that this claim raises self-censorship issues, the information involved is factual information which is easily verified. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.*, 425 U.S. 748, 772 n. 24 (1976).

It is worth observing that D & B has operated without First Amendment protections for a great number of years in the credit reporting industry and seems to be flourishing. Thus, history infers that this entity has not

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<sup>12</sup>Even in the case of relatively non-controversial topics such as advertising, it has been observed that the media are generally more vulnerable to the chilling effects of government regulation because they have less financial interest than the advertisers in the distribution of any particular type of advertising. Note, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. of Chi. L. Rev. 205, 251 (1976) (hereinafter cited as Note, *First Amendment Protection*).

been chilled by threats of self-censorship caused by a lack of First Amendment protection.

Professor Anderson, after observing that the additional protections in *Gertz* may be more apparent than real since it is doubtful that there have been many substantial recoveries where there is no fault, takes the position that there are certain types of defendants "for whom in comparison with the press, the danger of self-censorship is less." Anderson, *supra*, at 442-43. Anderson identifies credit reporting agencies and business entities attacking the products or services of a competitor as examples of those who have a greater incentive to take risks than would the media publishing about similar issues. These entities should not be protected out of concerns for self-censorship. It is incongruous for D & B to claim that it might be susceptible to self-censorship when, after thriving for all these years without the protections it now claims it needs, it offers not one concrete example of a credit report it squelched out of a self-imposed "blue pencil".

*Hood v. Dun & Bradstreet, Inc.*, 482 F. 2d 25 (5th Cir.) cert. denied 415 U.S. 95 (1974) holds that commercial credit reporting agencies should not be afforded First Amendment protection in defamation cases. In addition to relying upon the commercial speech doctrine, the court in *Hood* evidenced serious doubts that such companies would be inhibited by self-censorship if First Amendment protections were withheld. Because the common law privilege extended to credit reporting agencies is predicated upon the theory that absent such privilege, such companies would be driven out of business by the cost of defamation suits, the court in *Hood*, in connection with the self-censorship argument, analyzed the status of credit re-

porting agencies in jurisdictions that have declined to apply the common law protection.

In Georgia, where credit reporting agencies have no common law privilege, such businesses exist and are thriving. Indeed, the *Hood* court noted that D & B does business in Georgia despite the lack of the privilege and one of the largest credit reporting agencies in the country, Retail Credit Company, is based in Georgia.

The court also referred to a study comparing the activities of credit reporting agencies in Idaho, where no common law privilege exists, with credit agencies in the state of Washington, where the privilege does exist. 482 F. 2d 32 at n. 19. The conclusions of that study that no real difference in credit agencies' activities could be perceived in the two states led the *Hood* court to the conclusion that there is apparently no inhibition from publishing such reports due to the lack of the protection of the privilege.

Fear of media self-censorship was one of the crucial factors asserted by the majority in *Gertz* to extend First Amendment protection to the media. In order to retain the viability of that rationale, an extension of *Gertz* to non-media defendants would therefore necessitate the conclusion that all defendants, media and non-media alike, fear defamation suits to such a degree that they would engage in intolerable self-censorship to deter defamation claims. There do not appear to be "hard facts to support that proposition." *Gertz*, *supra* at 390 (White, J., Dissenting) and what statistical data has been compiled would suggest a contrary conclusion. The American Bar Foundation's study of defamation litigation, which is abstracted at Appendix B, points out that constitutional privileges may not provide more protection for non-media defendants than common law protection. This study certainly

contradicts the plethora of imaginable horrors suggested by numerous amici briefs.<sup>13</sup>

A fair distillation of the above considerations yields the conclusion that fear of self-censorship, irrespective of its capacity for objective verification, impacts the media, as a category, in a disproportionate manner than non-media defendants. Greenmoss submits that fear of self-censorship is inapplicable to non-media defendants, especially D & B, and accordingly, a major doctrinal underpinning of *New York Times* and *Gertz* is inappropriate in such cases.

When comparing the impact *vel non* of self-censorship on non-media speakers, a final comment is appropriate. In limiting suits for defamation, the impact is not felt by the populace. Rather, it falls directly and immediately on the defamed individual. If he is unable to obtain redress through the legal system because of First Amendment interests, the value of free speech is subsidized by those injured rather than by the *class* that benefits from a system of free expression. Once this tension is recognized, the difficulty of accepting free speech as an absolute covering all cases of defamation becomes apparent. By shielding all defendants out of concern for free expression, the burden of defamation is, therefore, placed on the party less capable of either avoiding or mitigating injury. *See*, Ingber, *Defamation, A Conflict Between Reason and Decency*, 65 Va. L. Rev. 785, 795-96 (1979). *cf.*, *Gertz*, *supra*, at 392 (White, J., Dissenting).

### C. Considerations of Content Regulation Are Inappropriate To This Case.

D & B claims that the imposition of liability for its speech is grounded upon the content of that speech and

<sup>13</sup>See abstract of American Bar Foundation Study set forth herein at Appendix "B".

this creates a discrimination against that speech which, it suggests, is anathema to the concepts of the First Amendment.<sup>14</sup>

Literally construed, of course, the content argument would render powerless the right of government to deal with obscenity, *Roth v. U.S.*, 354 U.S. 476 (1969); child pornography, *New York v. Ferber*, 458 U.S. 747 (1982); commercial speech, *Central Hudson Gas & Electric Company v. Public Service Commission*, 447 U.S. 557 (1980) and other expressions with minimal social value including defamation.

*Bolger v. Young's Drug Products Corp.*, 103 S. Ct. 2875 (1983) points out that the court is more inclined to permit content-based restrictions when the expression at issue falls within certain categories such as defamation. 103 S. Ct. at 2880 n. 7.

On at least two occasions during the past term, the Court has indicated that the general principle which has emerged from the cases relied upon by D & B for its content-based argument is that the First Amendment forbids the government from regulating speech in ways that favor some viewpoints or ideas at the expense of others. In *City of Los Angeles v. Vincent*, 104 S. Ct. 2118 (1984), the Court pointed out that:

The general principle that has emerged from this line of cases is that the First Amendment forbids the government from regulating speech in ways that favor some viewpoints or ideas at the expense of others. 103 S. Ct. at 2128. (emphasis added).

Similarly, *Bose v. Consumer Union*, *supra*, construes *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972) as espousing the principle of viewpoint neutrality.

<sup>14</sup>Since this argument is advanced both in connection with the media/non-media issue and the commercial speech argument, Greenmoss' comments here are intended to apply to both issues.

The philosophy of viewpoint neutrality is to restrict the power of the majority from suppressing support for a minority party or an unpopular cause or to exclude the expression of certain points of view from the marketplace of ideas. *Vincent, supra*, at 2128. When applied to this case, the question that begs asking is what viewpoint, cause or idea does this speaker advance by this speech or indeed what viewpoint, cause or idea does the speech itself espouse? The speech involved here, a credit report, is just fact-based information devoid of any thesis or viewpoint. The speaker here does not identify any viewpoint that is inhibited by the regulation at issue here. This is because D & B simply doesn't have a viewpoint in selling this speech.

Imposing the common law of defamation on credit reports, does not raise, we submit, any hints of bias or censorship; there is no design to suppress ideas or the viewpoint of the speaker. Indeed, the defamation involved here is neutral concerning any speaker's point of view.

The development of the viewpoint neutrality rule or, as D & B puts it, content regulation, is instructive because the claim advanced here relies heavily on *Mosley, supra*. *Mosley* involved a Chicago ordinance that banned picketing within 150 feet of a school but exempted peaceful labor picketing. The ordinance was improper, this Court held, because it discriminated among pickets on the basis of subject matter. Increasing opposition to a broad content neutrality doctrine culminated in *Young v. American Mini Theater*, 427 U.S. 50 (1976) where a plurality of the Court concluded that the question whether speech is or it not protected "often" depends on its content. *Id.* at 66-70. The essence of the *Mosley* rule, it was said, related to the point of view expressed by the comment. In *New York v. Ferber*, 458 U.S. 747 (1982), a majority of the

court adopted this position. Justice Stevens, concurring in the judgment, advanced the view that "the question whether speech is protected by the First Amendment *always* requires *some* consideration of both its content and its context." *Id.* at 765. (Emphasis added).

The Court has increasingly upheld content based restrictions in the areas of commercial and sexually explicit speech. Note, *Content Regulation and the Dimensions of Free Expression*, 96 Harv. L. Rev. 1854, 1855 (1983). State regulation of commercial defamation gives rise to no general concern of partisan bias. What bothers those who do not like to make content distinctions is the uncomfortable fact that not every sale of speech deserves the kind of special speech or press protections that should displace significant state interests. *Shiffrin, supra*, at 1268 and n. 327.

Since the major concern about content neutrality is that the government should not play favorites with speakers whose ideas are in competition with each other, the question arises whether non-media speech is in competition with media speech. In D & B's case, even assuming that there is the sale of ideas rather than facts, we submit that it cannot be seriously argued that D & B is in competition with the press and broadcast media for the sale of credit reports or credit information. Concurring in the *Bolger* judgment, Justice Stevens described as offensive a viewpoint bias which excludes one advocate from a forum "to which adversaries have unlimited access." 103 S. Ct. at 2890. Since media and non-media speakers do not compete in the same forum, they should not be deemed adversaries. A media/non-media distinction simply doesn't have the exclusionary aspects derived from the state's efforts to suppress a specific point of view that calls into play content discrimination arguments. Profes-

sor Redish, who is critical of content distinction arguments in the first place, addresses this concern as follows:

The most strained use of the equality principle is perhaps the suggestion that it should be employed to invalidate subject matter categorizations for purposes of First Amendment analysis. When distinctions are drawn between commercial and political speech, or between fighting words, libel, or obscenity and other forms of expression, it makes little sense to criticize the distinctions solely because different forms of speech are receiving unequal treatment. Such forms of expression do not compete with one another, as for example, do opposite positions on the Vietnam War or the defense budget. Those who do not receive protection for their commercial or libelous utterances are no worse off because other forms of speech are protected, and would be no better off if the other forms are also denied protection. This is not true when government prohibits the expression of only one viewpoint on a particular issue. In that case, the prohibited expression is harmed, in an equal protection sense, because competing views are allowed to be heard and would be better off if the competing views were also prohibited.

Redish, *The Content Distinction in First Amendment Analysis*, 34 Stan. L. Rev., 113, 139 (1981).

Even if D & B contends it competes with the media, the *Gertz* rule does not favor one viewpoint over another because the press, in circulating information, is not always espousing a viewpoint. The difficulties in applying viewpoint discrimination arguments here further highlight our position that the rules in *Gertz* were formulated and should be used only where the media is concerned. Those rules should not be expanded beyond those for whom they were crafted.

D & B infers that it uses the same medium for expression as the press, presumptively claiming that it is "the media" according to an unexplained definition of that

term. It also claims that in all but the most obvious cases, it is impossible to apply a media/non-media distinction. On the contrary, we believe workable description of the press and broadcast media can be utilized to establish a bright line of demarcation in all but a very few limited cases.<sup>15</sup>

Greenmoss does not propose to offer an all inclusive definition of the "media" but does feel a responsibility to suggest guidelines for analytical distinction. Any disseminator of printed material should not automatically be considered "the media". One who duplicates a document and passes it around the office would feel strange to be regarded as the "media" or the "press." The general distinguishing factor should be publication or acts leading to general dissemination to the public at large. *See Nimmer, supra*, at 652. Stated otherwise, the publisher, in order to be a media defendant, should not, by his actions or the structure of his distribution system, inhibit public access to the material. There should be no significant facts pointing to a discouragement of public access to the publication. In other contexts, the Court has had minimal difficulty describing what is meant by the media for purposes of those cases.<sup>16</sup> *See e.g., Saxe v. The Washington Post*, 417 U.S. 843 (1974).

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<sup>15</sup>The media/non-media distinction comes into play only in the event that the plaintiff is not a public figure or public official. In those instances, *New York Times* protection applies irrespective of the status of the defendant. It is only where the plaintiff is a private plaintiff, as contrasted with a public figure or public official that the status of the defendant becomes relevant and the media/non-media distinction comes into play. *See Eaton, supra*, 1406 and cases cited therein.

<sup>16</sup>It has been suggested that *Gertz* and *Miami Herald Publishing v. Tornillo*, 418 U.S. 241 (1974), taken together, may be viewed as insisting that the government refrain from interfering with the day-to-day editorial decisions of the press. *See Ingber, supra*, at 849-850. D & B engages in no editorial functions in connection with these reports.

**II. The Commercial Speech Doctrine, Though Narrower Than "Speech Of A Commercial Or Economic Nature", Applies To The Speech In This Case.**

The question of what constitutes commercial speech has been before this Court since 1942 when it held that commercial speech was entirely without First Amendment protection. *Valentine v. Chrestensen*, 316 U.S. 52 (1942). In 1976, the Court modified its position. It afforded limited First Amendment protection to commercial speech, holding that it is not wholly outside the protection of the First Amendment. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc.*, 425 U.S. 748 (1976). Unlike speech such as political speech and speech relevant to the operation of democratic institutions which is subject to full First Amendment protection because of the essential role it plays in the function of a democracy, commercial speech derives what constitutional value it receives solely because of the role it plays in our free enterprise economy where the allocation of our resources in large measure will be made through numerous private economic decisions. *Virginia Pharmacy*, *supra*, 425 U.S. at 765. Emerson has suggested a demarcation point which recognizes that "communications in connection with commercial transactions generally relate to a separate sector of social activity involving the system of property rights rather than free expression." *Emerson, Toward A General Theory of the First Amendment*, 72 Yale L. J., 877, 949 (1963).

The aphorisms D & B uses to explain why speech of a commercial nature should receive *full* First Amendment protection have already been considered by the Court in deciding whether to give commercial speech *any* First Amendment protection. To reintroduce those considerations in an attempt to afford commercial speech full con-

stitutional protection is just a form of applying a multiplier to the same considerations that give this category of speech some constitutional protection in the first place.<sup>17</sup>

D & B says what its speech is not but gives little attention to what its speech is. It asserts that what is involved here may be "speech about commerce" or "financial reports".<sup>18</sup>

For analytical purposes, it is more instructive to simply say what these reports are. They are business credit reports. The report involved here contained exclusively factual information about the present business condition of Greenmoss. The report constituted fact based information solely about business.

The Court has not defined commercial speech and efforts to do so have proved elusive. The precise boundaries of commercial speech have not been demarcated. Greenmoss is not aware of any case in which the Court has specifically ruled that certain speech is not commercial speech. We do not believe that the Court has limited commercial speech solely to product or service advertising and closely related methods of commercial solicitation. Certainly there is nothing in the decisions which analyze the doctrine of commercial speech which requires that commercial speech be limited to advertising.

As we have indicated previously, a substantial and consistent body of precedent has developed in the federal

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<sup>17</sup>In rejecting the claim that First Amendment concerns should enter into analysis of jurisdictional issues in defamation cases involving the media, a unanimous court in *Calder v. Jones*, 104 S. Ct. 1483 (1984) noted that such considerations are already taken into account in applying the Constitution to substantive law. "To reintroduce those concerns (at the jurisdictional stage) would be a form of double counting." 104 S. Ct. at 1488 (1984).

<sup>18</sup>See Supplemental Brief of Respondent on Reargument 41, n. 27, 43.

and state courts placing credit reports within the category of commercial speech.<sup>19</sup> Our research has uncovered no lower court decision rejecting the suggestion that credit reports constitute commercial speech. Even under the expansive test utilized by the plurality in *Rosenbloom*, Justice Brennan pointed out that no views were expressed therein on the extent of constitutional protection, if any, for purely commercial communications made in the course of business. 403 U.S. at 44 n. 12.

The Court's opinion in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978) contains at least some inference that credit reports may be within the commercial speech classification. (protection of *New York Times* may not be needed for commercial speech citing *Dun & Bradstreet v. Grove*, 438 F. 2d 433 (3d Cir. cert. denied, 404 U.S. 898 (1971)). 436 U.S. at 464.

Any effort to include particular speech within the rubric of commercial speech must begin with the recognition that "commercial speech is linked inextricably to commercial activity." *Friedman v. Rogers*, 440 U.S. 1, 10 n. 9 (1979). Publications which do no more than "inform private economic decisions" have been held to constitute such speech. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980).

The orderly development of the commercial speech doctrine is necessary so that government power to regulate commercial activity deemed harmful to the public is not frustrated merely because "speech is a component of that activity." *Ohralik, supra*, 436 U.S. at 447. As examples of speech which are constitutionally subject to

<sup>19</sup>Brief of Respondent at 17-18. A comprehensive comment on First Amendment protection for commercial advertising concludes that most factors relevant in the First Amendment status of business advertising apply in contexts such as the First Amendment status of business credit reports. Note, *First Amendment Protection*, *supra*, 205, 206-07 n. 15.

regulation due to their relation to commercial activity, the Court in *Ohralik* cited the exchange of information about securities (citing *SEC v. Texas Gulf Sulphur Company*, 401 F. 2d 833 (2d Cir.) cert. denied, 394 U.S. 976 (1969), corporate proxy statements (citing *Mills v. Electric Auto Light Company*, 396 U.S. 375 (1970)) and the exchange of price and product information among competitors (citing *American Column and Lumber Company v. United States*, 257 U.S. 377 (1921). Id. at 456.

A holding that commercial speech is limited to "advertising and closely related methods of commercial solicitation", as D & B claims, or a holding that these credit reports, which are fact based reports solely about the present business condition of a commercial enterprise, are not within the commercial speech doctrine could call into question the government's power to regulate where speech is a component of commercial activity. (See Tr. Oral Argument 12-13).

In fact, such issues are presently before at least two courts of appeal. See *SEC v. Lowe*, 725 F. 2d 892 (2d Cir. 1984), cert. pending, No. 83-1911, 53 LW 3020 (1984); See *SEC v. Suter*, No. 83-1452 (7th Cir. April 13, 1984).

*Lowe* involved the revocation of an investment advisor's registration under the Investment Advisors Act of 1940, 15 U.S.C. § 80b-1 et seq., and an injunction against the publication of newsletters which contained factual as well as advisory information. *Lowe*'s argument for full First Amendment protection for such publications was remarkably similar to that advanced here.<sup>20</sup>

<sup>20</sup>*Lowe* claimed that commercial speech included only direct product or service advertising and a seller's indirect informational advertising. Further, since *Lowe* reported about products which he did not offer himself and provided data about products offered by others, he claimed the newsletters could not be commercial speech. 725 F. 2d at 900. Compare Supplemental Brief of Petitioner on Reargument at 8, 40-42.

The Second Circuit, in an opinion by Judge Oakes, rejected this claim, holding that this Court's definitions of commercial speech do not limit commercial speech to product or service advertising and are broad enough to sustain the SEC's power to regulate and enjoin publication of those newsletters on the ground that they were commercial speech. 725 F. 2d 900-01. The opinion emphasized that content must supersede form in distinguishing commercial speech, citing *Bates v. State Bar of Arizona*, 433 U.S. 350, 363 (1977) and *Virginia State Board of Pharmacy, supra*.

*Lowe* finds commercial speech present where the speaker, familiar with business related matters in a particular industry, reports about data relevant to that industry to those who will use it for their own private economic decisions.

This leads to a discussion of *Bolger v. Young's Drug Products Corporation*, 103 S. Ct. 2875 (1983). In *Bolger*, the Court held that informational material broadly categorized as advertisements constituted commercial speech.<sup>21</sup> In *Bolger*, the Court moved away from the idea that speech which does no more than propose a commercial transaction is an indispensable ingredient to placing speech in the commercial speech category.<sup>22</sup> The Court

<sup>21</sup>One of the informational pamphlets discussed the issue of venereal disease in general terms and referred to the manufacturer only once at the very end of the material. It did not, for all that appears, directly suggest that the reader buy products made by Young's. See 103 S. Ct. at 2879 n. 4 and 2881 n. 13.

<sup>22</sup>"Young's Information Pamphlet . . . cannot be characterized merely as proposals to engage in commercial transactions." 103 S. Ct. at 2881. The "proposal of a commercial transaction" advanced by the Court in *Pittsburgh Press Company v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 385 (1973) "was probably not intended as an exclusive definition but only as a description of a prototypical form of commercial speech." Note, *First Amendment Protection, supra*, at 211.

posited that the mere fact that these pamphlets are conceded to be advertisements does not compel the conclusion that they are commercial speech. Therefore, not all advertisements are commercial speech<sup>23</sup> and commercial speech is not just "all advertising."

Secondly, *Bolger* advanced the notion that reference to a specific product does not by itself render material commercial speech. Indeed, the Court expressly disclaimed any opinion on whether reference to a particular product or service is a necessary element of commercial speech. 103 S. Ct. 2882 at n. 14.

Finally, *Bolger* noted that although economic motivation *by itself* does not turn material into commercial speech, the combination of all three considerations yielded the conclusion that Young's publications were commercial speech.

We suggest that commercial speech is a concept predicated on the informational process. The speaker participates in an informational process whereby the audience is assisted, directly or indirectly, in forming commitments which are potentially part of a contract of sale or service. See e.g. Note: *Reuniting Commercial Speech and Due Process Analysis: The Standard for Deceptiveness in Friedman v. Rogers*, 57 Tex. L. Rev. 1456, 1459, n. 18 (1979). When the speaker's actions have no other motivation than the incentive for monetary gain, the categori-

<sup>23</sup>In *New York Times*, Justice Brennan drew a line between purely commercial and "editorial" advertising which expressed opinion and sought support "concerning matters of the highest public interest and concern". 376 U.S. at 266. Using self-censorship analysis, the Court feared that any other conclusion would discourage newspapers from carrying such ideas and shut off an important outlet from people who do not have access to publishing facilities. Id. This bolsters our view that commercial speech is not just advertising and commercial solicitation.

zation of that speech as commercial speech is more appropriate but is, of course, not compelled. In this sense, when other factors are present, the primacy of the speaker's economic motivation should make downweight.

The combination of a particular profit motive and of content and subject matter triggers the categorization of commercial speech. Although economic motivation alone should never be sufficient to classify speech as commercial speech and commercial content or subject matter alone should be insufficient, the combination of selling fact-based information about business for no motive other than profit should place this type of speech into the commercial category. See *SEC v. Lowe, supra*; Note, *Constitutional Protection of Commercial Speech*, 82 Colum. L. Rev. 720, n. 2 (1982); *Shiffrin, supra*, 1258.

One important caveat is that speech which disseminates information about an activity itself protected by the First Amendment should not, absent exigent circumstances, be categorized as commercial speech. *Bolger v. Young Products, supra*, 103 S. Ct. 2882 at n.14; Note, *First Amendment Protection, supra*, at 236.

Because speech which is economic or commercial in nature does not, of necessity, have the two features outlined above, it is both too underinclusive and too overinclusive to justify its placement in a category of depreciated First Amendment speech.<sup>24</sup> A generalized definition such as speech that is commercial or economic in nature would not, we think, have sufficiently narrow limits. Speech which is economic or commercial in nature, without more, could involve speech by a taxpayer concerning political decisions such as taxation by government. While including credit reports, this definition could also include too

<sup>24</sup>It is difficult on the facts of *Bolger* to conclude that the speech was economic or commercial in nature and it does not appear that the Court so characterized it.

many other things which contribute to political dialogue and the functioning of democratic institutions.

The common ground between advertising and credit reports, recognized by D & B, is that they both convey information.<sup>25</sup> Many advertisers simply convey information and leave it to the audience to judge the relative advantage of its product over a competitor's. *cf. Bolger v. Young's Products, supra*. Therefore, contrary to providing a distinguishing factor, this consideration supports the conclusion that business credit reports should be commercial speech.

D & B claims that when a statement about a firm, product or service is made by someone other than its seller, the state's interest in regulating disappears and implies that statements which serve solely an informative function should receive full First Amendment protection.

This argument fails to consider the holding of *Pittsburgh Press Company, supra*, that a newspaper's publication of want ads placed in the classified section of the paper constitute commercial speech. The Pittsburgh Press clearly had not proposed a commercial transaction between its readers and itself nor had it discussed its own product. Rather, it had published the employment proposals of others for a fee. The distribution of this speech, which was informational in nature, whereby the speaker assisted the audience in forming commitments leading to a contract, joined with the fact that the speaker performed such action out of profit based motives resulted in the Court placing the speech in the commercial category.

Thus, *Pittsburgh Press* nullifies any claim that speech about one's own product is the *sine qua non* of commercial speech. In *Bolger*, the commercial speaker's state-

<sup>25</sup>Supplemental Brief of Petitioner on Reargument at 41 n. 27. See also, Amicus Brief of Dow Jones Company at 11.

ments about its own products were minimal at best. If such were the test, advertising which compared the speaker's product or service with a competitor's could take the speech out of the commercial speech category. Comparative information dissemination always necessitates that the speaker discuss facts or features about someone else or someone else's product or service. Like credit reports, this information is usually fact based, tends to have objective parameters and is easily verified. The reports here deal with tangible items that are easily susceptible to empirical testing. They are in large part drawn from official documents often prepared by the target of the speech itself such as annual reports filed with state corporation departments (Tr. 352-53). Therefore, credit reporting agencies have, generally speaking, better and easier access to facts than do, for example, the media whose access to facts may be drawn from sketchy or conflicting sources. The "informational function" of advertising, not the business of advertising itself, prompted the commercial speech categorization in *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557 (1980).

Any suggestion that credit reporting agencies have to assemble these facts under time pressures, thus making them more like newspapers than advertising, is clearly outweighed by the need for accuracy.<sup>26</sup> The risk of harm to someone else's personal or property interests, of course, increases the level of accuracy needed in the verification process but does not alter the conceptual simplicity of that process.

<sup>26</sup>False commercial speech does not assist the consumer in making the proper economic decision. See *Virginia Board of Pharmacy, supra*, 425 U.S. at 771-72. In this case, D & B offered no evidence at trial that checking the accuracy of such reports (as its procedures required) would have delayed its circulation.

D & B fails to explain why it is acceptable that a speaker's economic motive to disseminate advertising renders that speech "hardy" but those same motives cannot render other speech hardy.<sup>27</sup> A business which decides to attack a competitor's product or service in order to prevail in a competitive bidding contest probably engages in a type of speech which would be characterized as "hardy". The speaker has decided in that case that the potential reward merits the risk. The rough and tumble of the business contest does not need First Amendment protection in order to invigorate the speech.

These considerations point to the futility of attempting to maintain a general constitutional distinction between commercial advertising and other commercial activity. Cox, *The Supreme Court 1979 Term—Foreward: Freedom of Expression in the Burger Court*, 94 Harv. L. Rev. 1, 33 (1980). In short, the speech here, merely because it is not advertising, should not be determined to be non-commercial speech or speech entitled to full First Amendment protections. In terms of political decision making, the contribution to political dialogue and the operation of democratic institutions, these fact-based information reports about business are not more, and probably less important than a host of other market activities that states may ban entirely if they are false or potentially misleading. cf. Jackson and Jeffries, *Commercial Speech, Economic Due Process and the First Amendment*, 65 Va. L. Rev. 1, 18 (1979).

No matter how expressed, a ruling which does not analyze or accept this speech as commercial speech will

<sup>27</sup>Supplemental Brief of Petitioner on Reargument at 47 n. 27. D & B's assumption seems to be that media speech can never be commercial speech. The Court had no trouble rejecting that approach in *Pittsburgh Press*. See, Note, *First Amendment Protection, supra*, at 212.

justify lower courts in concluding that credit reports and reports closely analogous thereto are not commercial speech and may signal an end to the continuing development of a comprehensive commercial speech doctrine.

It will also signify a ruling that false statements of fact do have constitutional value. In *Bose v. Consumers Union of United States, Inc.*, *supra*, the Court noted that false and misleading commercial speech could be deemed to represent a category of unprotected speech. "The rationale for doing so would be essentially the same as that involved in the libel area, *viz.*, there is no constitutional value in false statements of fact." 104 S. Ct. at 1961-62 n. 22. A ruling that business credit reporting agencies which distribute false factual reports may be regulated by the states in at least the three tiered manner undertaken by the trial court would be entirely consistent with that approach.

Comparing D & B's speech here with other forms of speech such as "media speech", yields some common sense distinctions between them. The reader or viewer of media offerings hopes and is probably optimistic that the facts contained in the presentation are at least reasonably accurate. This would, of course, be the goal of any responsible journalist. But the public is sufficiently sophisticated to know that this is not always the case and, therefore, it can safely be said that the public tempers its wholesale acceptance of the veracity of media speech. Because the media serves the function of stimulating ideas, however, we tolerate these errors of fact in order to propagate the diversity of ideas. We submit that credit reporting companies are vastly different. Business decisions which are weighty to the recipients of these reports are made in reliance upon them. The recipient does not want to be stimulated by ideas; he is buying specific factual data which credit reporting companies sell. These facts

assist the recipient in making his own economic decisions which decisions do not affect the credit reporting company but rather affect the business and credit relationship between the recipient and the target of the report.<sup>28</sup> The recipient wants and needs nothing more than accuracy in these reports. This past term, the Court recognized a fundamental precept that has special relevance here. "False statements of fact harm both the subject of the falsehood and the readers of the statement." *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473 at 1479 (1984) (emphasis in original).

Despite everything that can be said to the contrary, granting D & B the "limited relief" it seeks here, namely, the same protection the media publisher in *Gertz* received for an article having as its thesis a nationwide conspiracy against the police, will elevate the speech in this case to the same status as political speech about matters of the highest public concern and will have no other effect than to trivialize the First Amendment. Lower courts could not help but miss the message that credit reports, despite the unanimous authority of the lower federal courts to the contrary, are not commercial speech. An equally disconcerting message will be that irrespective of the relevance of the speech to "core notions" of the First Amendment, the *New York Times/Gertz* rules apply.

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<sup>28</sup>It was in this sense that we have previously stated that these reports are not solely in the economic interest of the speaker and audience. This speech is, of course, made solely in the economic interest of the speaker as respects his motive for dissemination but not in conjunction with any transaction, actual or potential, between speaker and audience. The audience's economic interest in this speech is solely in conjunction with a transaction between the audience and the target of the speech. If the prototypical description of commercial speech is to be retained, "predominantly" should perhaps be substituted for "solely". *Shiffrin, supra*, at 711. cf. *Roberts v. United States Jaycees*, 104 S. Ct. 3244, 3259 (1984) (O'Conner, J., Concurring).

To accept the proposition D & B advances would avoid the need to draw any lines because the coverage of the First Amendment would not simply be elastic; it would be infinite. The specter of line drawing is a theme D. & B. repeatedly emphasizes.<sup>29</sup> We do not believe that this is a reason sufficient to abandon the inquiry entirely. To withdraw an entire field from the opportunity to make analytical distinctions because doing so removes the need for inquiry in the future contradicts the concept of restraint in the exercise of judicial review. *Jackson and Jeffries, supra*, at 20; Bork, *Neutral Principles and First Amendment Problems*, 47 Ind. L.J. 1, 28 (1971). We believe that the commercial speech doctrine, when applied as we have suggested above, can offer principled dividing lines without concern for partisan bias.

In related areas, the Court has drawn such lines. *Connick v. Myers, supra*, (speech of public employees made in their employment capacity not touching on matters of public concern is unprotected under the First Amendment); *NLRB v. Gissell Packing Corporation*, 395 U.S. 575, 618 (1969) (all speech of participants in labor disputes is not protected merely because some of it is protected).

This is not to say that commercial speech does not have substantial First Amendment protections. When commercial speech is true and not misleading, it can receive significant First Amendment protection. *Bolger v. Young's Products, supra*, *Virginia Board of Pharmacy, supra*. We do not suggest a simplistic, two-level theory which posits that credit reports, as commercial speech, are *per se* unprotected. *cf.*, Note, *First Amendment Protec-*

<sup>29</sup>Perhaps it is because D & B wants no lines to be drawn that it offers no suggestions as to how to define commercial speech or distinguish media from non-media defendants.

*tions, supra*, at 213-18. Our earlier brief reviewed the factors which showed that the governmental interest behind the three-tiered approach utilized by the trial Court strongly outweighed the minimal First Amendment value of such speech.<sup>30</sup>

However, since false and misleading commercial speech assists no one in arriving at correct economic decisions and since those decisions are on a lower constitutional rung in the first place, strong reasons to place false and misleading commercial speech in an unprotected category exist. Since the *mens rea* requirement in *Gertz* of actual fault is grounded on the potential chilling effect that large damage awards could have on the media in reporting true information of public interest, the *mens rea* requirement can be dispensed with in regulating false and misleading commercial speech. The trial Court's method of permitting only nominal damages after a threshold showing of fault had been made by Greenmoss exceeds this standard. As indicated previously, Greenmoss had to and did prove by a preponderance of the evidence that it had in fact been harmed in order to receive its compensatory damage verdict. Thus, the level of protection afforded this speech was at least commensurate with its subordinate position in the scale of First Amendment values. *See Ohralik, supra*, 436 U.S. at 455-56; *See Jackson & Jeffries, supra*, at 24, 38.

In *Ohralik*, the Court rejected an argument that actual injury was necessary before a state could regulate false and misleading commercial speech. Similarly, in *Friedman v. Rogers, supra*, the potential for deceptiveness was sufficient to justify regulation without proof that any recipient of the information had been deceived. The diver-

<sup>30</sup>Respondent's Brief at 20-22.

sity of factual situations in which the commercial speech doctrine has arisen and the consistent holdings of the lower federal courts applying the commercial speech doctrine to defamation actions affords no basis for distinguishing tort litigation from government efforts to regulate. Both are designed to protect citizens from harm caused by anti-social conduct. As one example of the diverse factual patterns in which the commercial speech doctrine arises, in *Ohralik, supra*, the suspension of an attorney to practice law served as the springboard for the commercial speech doctrine.

In summary, we do not believe that "speech that is of a commercial or economic nature" should be the definitional framework for placing speech that is false or misleading in an unprotected category under the commercial speech doctrine. However, the narrower tests which we have analyzed and proposed herein should, at minimum, include the credit reports at issue in this case.

---

### CONCLUSION

Based on the foregoing, Greenmoss respectfully requests the Court to affirm the judgment of the Vermont Supreme Court.

Dated at Burlington, Vermont this 22nd day of August, 1984.

Respectfully submitted,

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### APPENDIX A

#### Ad Damnum Considerations

First, Greenmoss was aware that the news media makes a customary practice of publishing, on a selective basis, certain new court filings in the Washington County (Vermont) Superior Court. This court is located in the capitol city of Vermont (Montpelier) and several news bureaus are situated in close proximity to the Courthouse. Litigation involving Dun & Bradstreet, especially one with a high *ad damnum* in the Complaint, could well cause unnecessary attention to the litigation and inject tangential issues into the trial. Secondly, the area served by the Washington Superior Court is relatively small in population and the Court, in the exercise of economy, often selects small panels for jury selection. A potential juror's previous knowledge about a case on account of his reading press reports about it could lead to his disqualification and thus render ineligible an otherwise qualified juror. For these reasons, the decision was made to assert an amount in the *ad damnum* which would be less likely to attract undue attention and publicity. Additionally, the Complaint was filed in October, 1977 and several of the post-defamation activities of D & B which Greenmoss claimed were oppressive took place after the filing of the Complaint. For a review of these activities, see Brief of Respondent at 2-5.

Finally, after discovery was completed, Greenmoss moved to amend its *ad damnum* to seek \$300,000 in damages. See Motion to Amend Complaint dated March 3, 1980 and Plaintiff's Counsel's letter to the Washington Superior Court dated March 24, 1980.

**APPENDIX B**

Under a grant from the American Bar Foundation, a study of defamation litigation was performed analyzing cases over a 3½ year period. Franklin, *supra*, at 459.

The starting point of the study was selected to allow lower courts to assimilate the *Gertz* decision (Franklin, *supra*, at 459.) Libel litigation appears to be a very small percentage of all litigation, comprising some 0.36% of reported cases (459). *The most striking feature of the study was the plaintiffs' low success ratio which Franklin characterized as 5% of the media cases and 12% of the non-media cases* (476, 497-500). Because of nearly equal success ratios on appear, the study concluded that state law provided strong protection for non-media defendants (489). The media defendants' advantages and constitutional privileges were counterbalanced by the non-media defendants' greater reliance on state law privileges (471). The data gave support to the hypothesis that *constitutional privileges might not play as great a role in litigation as their predominance in legal literature might suggest* (465, 498-499). Media defendants were defined as those engaged in newspaper, magazine or book publishing or in broadcasting. (465). Non-media defendants were categorized as past employers, business-professional, governmental units (which three groups accounted for two thirds of all non-media defendants), corporations, creditors, present employers, labor unions and credit reporting companies (which accounted for approximately 2% of all non-media cases) (471-72 n. 39, 479 and n. 57). 31% of all cases involved media defendants and 69% of the cases were non-media defendants (465).

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No. 83-18

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1984

DUN & BRADSTREET, INC.,  
*Petitioner,*

v.

GREENMOSS BUILDERS, INC.,  
*Respondent.*

On Writ of Certiorari to the  
Supreme Court of the State of Vermont

REPLY BRIEF OF PETITIONER ON  
REARGUMENT

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## ARGUMENT

## I.

THIS CASE CONCERNS DAMAGES, NOT  
LIABILITY.

This is a case about damages. The Petitioner has never argued that the First Amendment bars recovery for defamation. What it contends is only that the First Amendment does not permit awards of presumed and punitive damages against any defamation defendant absent "actual malice."

By deciding that all defamation defendants have the same First Amendment rights, the Court would not "broaden *New York Times* beyond even the limits of *Rosenbloom*." (Supplemental Brief of Respondent at 18) The plurality in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), conditioned liability on a showing of actual malice in cases involving matters of "public or general interest." 403 U.S. at 43. In contrast, the ruling sought here would permit recovery regardless of the subject matter. Private defamation plaintiffs not subject to the actual malice standard of liability required by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), would remain free to recover full compensation for any actual injury suffered. *Rosenbloom* would have prevented most such plaintiffs from making any recovery at all.

Likewise, there is no risk of "constitutionaliz[ing] all state laws of defamation" or "displac[ing] the development of the common law." (Supplemental Brief of Respondent at 27) In actions by private plaintiffs, the States would remain free to set the standard of fault required for recovery of actual damages. In all defamation cases, state law would continue to control such

questions as (1) whether a particular statement is capable of a defamatory meaning, (2) what evidence is sufficient to prove a causal connection between a publication and alleged injury, (3) what evidence is required to establish innuendo, (4) what evidence is required to prove colloquium, (5) when evidence is admissible in aggravation and what its effect should be, (6) when evidence is admissible in mitigation and what its effect should be, (7) when defamation is actionable only upon proof of special damages, (8) what injury would qualify as "special damages," (9) what the measure of damages is for defamation, and (10) what publications are privileged.<sup>1</sup> What the States would not be free to do is to permit juries to award presumed or punitive damages unless calculated falsehood is shown.

A decision that private plaintiffs alleging defamatory falsehood are limited to actual damages absent actual malice would hardly "call into question the government's power to regulate where speech is a component of commercial activity." (Supplemental Brief of Respondent at 39) To the contrary, *the decision would permit the States to regulate defamation to the fullest extent of their interest*: plaintiffs could recover full compensation for any actual injury. Since this case would affect only awards of presumed and punitive damages for defamation, fears of undesired effects in other regulatory contexts are unfounded.

Greenmoss is wrong in contending that the resolution of this case would impact regulation of the type involved in *SEC v. Lowe*, 725 F.2d 892 (2d Cir. 1984).

---

<sup>1</sup> A holding that the First Amendment prohibits presumed and punitive damages would not render conditional privileges obsolete. Privilege defenses affect liability, not damages.

The Second Circuit held that Lowe, by virtue of six prior criminal convictions (including several felonies) in connection with his investment advisory business, could be prohibited under the Investment Advisers Act from selling investment advice. Present in *Lowe* was a strong governmental interest in preventing an often convicted criminal from practicing further in a highly regulated profession. No such interest exists in this case. To recognize the limitations of the States' interest in compensating defamed plaintiffs for unknowing, non-reckless falsehood would not weaken regulatory actions in other contexts premised upon overwhelming interests not present here.<sup>2</sup>

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<sup>2</sup> At oral argument last March, Justice O'Connor asked whether this case would affect Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1982) and its related Rule 10b-5 (17 C.F.R. § 240.10b-5 (1983)). It would not. Under *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), scienter is an essential element of liability under Rule 10b-5. Scienter is the forebear of actual malice; deceptive intent is the substantial equivalent of actual knowledge of falsity or reckless disregard for the truth. *Bose Corp. v. Consumers Union of United States, Inc.*, 104 S. Ct. 1949, 1960 (1984). To recover under Section 10b and Rule 10b-5, a plaintiff must also prove actual damage caused by a misstatement or omission of material fact. See *Clark v. John Lamula Investors, Inc.*, 583 F.2d 594 (2d Cir. 1978); *Sackett & Kvan, Inc. v. Beaman*, 399 F.2d 884 (9th Cir. 1968). A ruling for D&B would make the elements of defamation much the same as the elements of securities fraud, with no change at all in the latter. In both instances, First Amendment interests could be overcome by proof of conscious deception or reckless disregard for the truth. Punitive damages are not recoverable for federal securities fraud. *Globus v. Law Research Service, Inc.*, 418 F.2d 1276 (2d Cir. 1969), cert. denied 397 U.S. 913 (1970). The punitive damage aspect of this case would therefore have no bearing on securities laws.

The suggestion that the Fair Credit Reporting Act would somehow be impaired is equally unfounded. That Act does not permit

## A. Punitive Damages

Eighty-six percent of the verdict on review consists of punitive damages. Yet Greenmoss relegates the punitive damage issue to a scant three paragraphs of its fifty-two page brief. The reason is quite simple. The verdict is indefensible. This case is a clear example of punitive damages assessed in wholly unpredictable amounts, unrelated to any actual harm, and used selectively to punish an unpopular speaker—an out-of-state financial reporting company. *See Gertz*, 418 U.S. at 350.

Greenmoss tries to avoid the holding of *Gertz* that punitive damages are irrelevant to the states' legitimate interest in compensating injury for defamation. 418 U.S. at 350. It argues lamely that the punitive damages awarded here had nothing to do with defamation. But libel was the only tort alleged. Not even Greenmoss would suggest that Vermont somehow permits an independent action for punitive damages.

The claim that punitive damages were awarded to punish conduct quite apart from the publication ignores the trial court's charge. The trial court framed the issue in terms of the defendant's actions "in publishing the article in question." (J.A. 20) (See Reply Brief of Petitioner at 7-8 concerning the trial court's charge on punitive damages.) By authorizing unlimited, arbitrary damages without regard to knowledge of falsity or reckless disregard for the truth, the charge on punitive damages violated the First Amendment.

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recovery of presumed damages. 15 U.S.C. § 1681 (n), (o) (1982). It limits recovery to actual injury—the same result sought here.

## B. Presumed Damages

Failing to explain why the States have a legitimate interest in overcompensating Greenmoss and other private plaintiffs, Greenmoss argues that the trial court's instructions on libel *per se* and presumed damages had no bearing on the verdict and should be ignored. But the jury was told that the "plaintiff *does not need to prove actual damages resulting from the libel since damage and loss is conclusively presumed.*" (J.A. 17) (emphasis added). To argue that the jury was limited to awarding damages for actual injury ignores the plain language of the charge.<sup>3</sup> Here, as in *Gertz*, because the "jury was permitted to presume damages without proof of injury," a new trial is required. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 352.

Greenmoss' arguments on sufficiency of the evidence neither cure the defective charge nor avoid the need for a new trial. Moreover, the record provides no evidence of a causal connection between the publication and Greenmoss' alleged lost profits. The company's sole evidence on lost profits came from its former president, John Flanagan. He testified that in the year after the Special Notice, Greenmoss' profits were the highest in its history. (Tr. 143) Without pointing to any lost sales or broken deals, he simply declared that those profits were not as high as Greenmoss had

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<sup>3</sup> Greenmoss paraphrases the charge instead of quoting it. Much is lost in translation. The trial court itself found that while the charge did not compel the jury to award substantial damages, "language in the charge may have misled the jury to believe that damages were presumed in some amount in the case." The charge "permitted the jury to believe that damages could be awarded to the plaintiff for defamation absent proof of damages and absent a showing of knowledge of falsity or reckless disregard for the truth by the defendant." (J.A. 25-26)

hoped. The only reason he gave for the alleged shortfall was the termination of the Howard Bank's relationship with the company. (Tr. 80)

But Wayne Duprey, the bank officer in charge of Greenmoss' account, testified that the Special Notice had nothing to do with that decision:

Q When you received this Report of Bankruptcy, did you believe it?

A No. I was inquisitive, but not—I didn't believe it, because I usually follow the Bankruptcy Notices in the paper.

....

Q Did you refuse to go forward with the financing because of this Notice?

A Not at all.

Q Did you receive any subsequent Notice from Dun & Bradstreet concerning the financing?

A Yes, I believe within a week later we received a Correction Notice.

Q Did that resolve the situation in your mind or did you have any lingering results?

A It was resolved right after I got it. I'm not sure if Mr. Flanagan had an appointment with me that day, or if I phoned him that day, but we spoke that day regarding the Report and I'm probably the one that informed him that Dun & Bradstreet had, you know, their Report out that they had filed Bankruptcy, and I was assured by John that they were still alive and kicking and weren't bankrupt.

Q So as far as you were concerned, that was the end of it?

A Yes.

....

Q Did you circulate that Dun & Bradstreet Report to anyone?

A No, I did not. [Tr. 212-13] [emphasis added].

\* \* \*

Q Did you meet with others at the home office to discuss the loan application?

A Yes. I asked two of the senior officers to come out and meet with Greenmoss on this proposal.

Q Did you provide them with a copy of the Bankruptcy Notice of July 26?

A No.

Q As far as you're aware did they learn at all that there were stories about bankruptcy for Greenmoss Builders?

A Not at all.

Q Were you present when this — when the officers of the Bank discussed whether or not the Greenmoss requests for loans should be accommodated or not?

A Yes, I was involved in the meeting, yes.

Q Was Greenmoss' Bankruptcy ever discussed?

A Not to my knowledge it wasn't.

Q Did the Howard Bank decide to go forward with the Greenmoss request for financing, or did they decide not to be forward?

A We declined the request.

Q *Was the fact of the bankruptcy at all a consideration that tended towards the — your Bank's denial of that request?*

A *Not at all.* [Tr. 214-15] [emphasis added].

\* \* \*

Q Could you tell me then, Wayne, why the Howard Bank decided not to accommodate the loan request from Greenmoss Builders in 1976?

....

A . . . The concerns expressed by senior officers who judged this request, they were concerned regarding the high debt to worth ratio, which is a ratio of the total debt of the Corporation divided into their net worth. Their working capital was not sufficient for the level of sales that they had. There were some shareholder loans that either had to be subordinated or converted into equity, and this probably was not possible under Subchapter S. The existing mortgage that we had we felt was the maximum for the value we believe the property had. We would not advance any additional funds on that building. [Tr. 251-253]

\* \* \*

Q *Is it fair then to say, Wayne, that the reason that the loan was declined is that the*

*Howard Bank ultimately decided it was in jeopardy of [not] being repaid should the line of credit be extended?*

A *That was the decision, yes.* [Tr. 254] [emphasis added].

Thus, the Howard Bank knew the Special Notice was erroneous and paid no attention to it. Greenmoss admits that when the bank denied its request, Greenmoss got an even bigger loan from another bank. (Tr. 77-78) Obviously, the Special Notice had no bearing on Greenmoss' profit.

Greenmoss argues that a state's interest is "heightened" when a defamatory report reaches "those with an established relational interest" with the subject. The argument ignores the fact that those with an established relationship with Greenmoss would recognize an error and would most likely call it to Greenmoss' attention.<sup>4</sup> Greenmoss insists that it was more apt to suffer damage here than if the identical words had been published by *The Burlington Free Press*. But a newspaper article would have reached not only many who had dealt with Greenmoss, but also many potential creditors, customers, or suppliers. Where the audience is so small, there is virtual certainty that a prompt retraction can be effective. On the other hand, a retraction in *The Burlington Free Press* might not be noticed by most of those who read the initial false report.

Greenmoss then insists that it has an insurmountable proof problem even though the D&B reports are

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<sup>4</sup> Of course, that is precisely what happened here. Wayne Duprey got the erroneous Special Notice, did not believe it, and discussed it right away with John Flanagan.

sent to the *very* people with whom it has "established relational interests." It suggests that its creditors, bankers, and customers — the very people who would want it to succeed — would perjure themselves to keep Greenmoss from recovering damages justly due. (Supplemental Brief of Respondent at 18) That argument is cynical at best and has neither precedent nor evidence to support it. The problem for Greenmoss is not that actual damage is difficult to trace to D&B. The problem is that actual damage did not exist.

Amicus Sunward's claim that it could not meet the "insurmountable" burden of causation is equally specious. In *Sunward Corp. v. Dun & Bradstreet, Inc.*, No. 82-K-147 (D. Colo. filed January 27, 1982), Sunward won a \$3,847,488 verdict based entirely on the doctrine of presumed damages. Sunward's libel claim was based on a D&B report that underestimated Sunward's annual sales and the number of its employees by a substantial percentage. Sunward made no effort to prove any causal connection between the report and a subsequent decline in sales, which the evidence showed was caused by mismanagement and a downturn in the agricultural economy which Sunward served. Instead, Sunward put its own personnel on the stand to testify about rumors of unknown origin that Sunward was in financial difficulty. Sunward's counsel attributed the sales decline to those rumors.

Sunward had available to it through discovery the names of over one hundred recipients of the allegedly defamatory report. Sunward's own records contain the names of its 240 salesmen, 1300 dealers, 26 bankers, nearly 100 suppliers and numerous customers — the persons whom, it was argued, might have acted adversely to Sunward as a result of the report or the ru-

mors. Nevertheless, Sunward called not one report recipient, not one salesman, not one dealer, not one banker, not one supplier, and not one customer to testify that the report or any rumor adversely affected their relationship with Sunward. Instead, Sunward introduced evidence of its decline in sales and, like Greenmoss, "projections" of profits it thought it should have made, and relied completely on the doctrine of presumed damages to prove causation. Far from illustrating a legitimate state interest in permitting awards of presumed and punitive damages absent actual malice, the Greenmoss and Sunward verdicts are perfect examples of unmerited windfalls which over-compensate private plaintiffs and punish unpopular speakers.

Finally, Greenmoss' musings about the confidentiality of D&B's reports are nothing but red herring. The jurisdictions that recognize a privilege for such reports normally require proof that the report be made in confidence. *E.g., Erber & Stickler v. R.G. Dun & Co.*, 12 F. 526 (C.C. Ark. 1882); *Hooper-Holmes Bureau, Inc. v. Bunn*, 161 F.2d 102 (5th Cir. 1947); *Bradstreet Co. v. Gill*, 72 Tex. 115, 9 S.W. 753 (1888). The confidentiality requirement therefore serves state interests. It does nothing to increase or expand the States' legitimate interest in compensating injury for defamation.

## II.

### "MEDIA"/"NON-MEDIA"

#### A. Greenmoss' "Guidelines"

In Greenmoss' view, speakers are free to speak only about politics and self-government. What scientists say about science, what artists say about the arts, what scholars say about their universities, and what busi-

nessmen say about business could be censored, banned, and punished if Greenmoss' contention is upheld. Needless to say, this Court's decisions give Greenmoss no support.<sup>5</sup> See Supplemental Brief of Petitioner at 32-35.

Greenmoss proposes a mishmash of result-oriented rules to avoid the central inquiry before this court: what interest do the States have in permitting discretionary windfalls of presumed and punitive damages for defamation absent a showing of calculated falsehood? Far from offering a principled approach to the issue, Greenmoss' rules would give different speakers of the same words different constitutional protections depending on the mode of communication, the size or venue of the audience, and other equally irrelevant factors.

The line that Greenmoss urges the Court to draw is a jagged one, if indeed its points connect at all. Though apparently recognizing the problems of *Rosenbloom*'s "general or public concern" test, Greenmoss posits its own equally troublesome variation on that theme. According to Greenmoss, First Amendment rights depend on whether speech is "public speech." It defines "public speech" as speech with a "nexus to public affairs." The distinction between speech of that sort and *Rosenbloom*'s speech of "general or public concern" is metaphysical at best. Since *Gertz* expressly

<sup>5</sup> Greenmoss and Sunward both concede that D&B has First Amendment rights. Sunward even asks the Court to "admonish" the States that they "cannot impose liability without fault" against D&B. (Brief of Amicus Curiae Sunward Corp. on Reargument at 5) When Sunward admits that *Gertz*'s fault requirement should apply to D&B, it makes no sense to urge that *Gertz*'s damage rules should not.

rejected the latter formulation as an inadequate means of accommodating the competing interests at stake in the law of defamation, it is incomprehensible that *Gertz* could be interpreted to espouse the same approach cloaked in slightly different verbiage.

Greenmoss therefore hedges its bet. It serves up another test, relegating the First Amendment to speech "made in public." Under this approach, all those who speak in public are the "media."<sup>6</sup> Others have lesser First Amendment rights.<sup>7</sup> The "media," though, are protected unless what they say reflects "mere public curiosity about private matters" — whatever that means. The distinction between "media" and "non-media" would depend on whether a speaker acts to disseminate his views generally "to the public at large" — whoever that may be. Greenmoss feels no obligation to define its concepts further. It would commit that task to the judiciary, who would doubtless find Greenmoss' "guidelines" too vague to follow.

The suggestion that speech deserves protection only when disseminated broadly has no support. There is nothing in the Constitution or the decisions of this Court that would make speech uttered to a select few on a mountaintop less free than speech shouted in the

<sup>6</sup> Sunward sees this bright line test in a much dimmer light. Recognizing the difficulties of Greenmoss' analysis, Sunward would divide the world into the protected shores of "media," the bleak plains of "non-media," and the purgatory of "quasi-media." In the next breath, Sunward tells the Court to abandon that mythology altogether. It invites the Court instead to fashion a special category for "business libel," making it easier for corporations than individuals to recover exorbitant windfall damages.

<sup>7</sup> Greenmoss' test may be even fuzzier than this. Apparently Greenmoss would retain First Amendment safeguards for statements about public figures, whether spoken "in public" or not.

marketplace. The size of the audience should have no bearing on the legitimacy of the speaker's First Amendment interests.<sup>8</sup>

The "common sense distinctions" Greenmoss finds between reports by D&B and by the "media" simply will not wash. It would come as a rude shock to journalists that they report no facts but only write opinions.<sup>9</sup> Most of what the *New York Times* prints consists of factual reports without a stated or unstated thesis. If the "main characteristic" of D&B's reports is that "they are primarily factual" (Brief of Amicus Curiae Sunward Corp. on Reargument at 14), that characteristic describes all but the editorial pages of every major newspaper. In fact, Mr. Duprey of the Howard Bank testified at the trial that he read both local newspapers and D&B reports to learn about bankruptcies.<sup>10</sup> (Tr. 212, 230)

\* In an effort to discredit D&B's First Amendment interests, Greenmoss cites a recent article by Professor Shiffrin. (Supplemental Brief of Respondent at 22) Shiffrin's myopic view is that the only interest at stake is one of encouraging investment in D&B. He ignores the Court's consideration of the free flow of information in *Virginia State Board of Pharmacy v. Virginia Citizen's Consumer Council, Inc.*, 425 U.S. 748 (1976), no doubt because that would upset the symmetry of his theory. Professor Shiffrin would have done better to consider the interests of the speaker, the audience, and the subject rather than the interests of those who buy the speaker's stock.

\* While the line between fact and opinion is often difficult to draw, D&B's ratings are plainly matters of opinion. See R. Cole, *Consumer And Commercial Credit Management* 346-49 (7th ed. 1984).

<sup>10</sup> Greenmoss' definition does not meet the concerns expressed at oral argument by Justice Stevens and Justice Rehnquist, who asked why the words "Greenmoss is bankrupt" should be more protected when published in a newspaper than when published in a D&B Special Notice. (Oral Argument Tr. 48-49)

Greenmoss is wrong when it characterizes D&B's objections to its vague guidelines as a reluctance to draw lines in First Amendment cases. Line-drawing for the sake of drawing lines serves no purpose. What is needed is a line that properly accommodates the competing interests at stake in defamation. That line was drawn in *Gertz*. Where presumed and punitive damages are concerned, the distinction is between cases of actual malice and cases involving something less. In the former case, the First Amendment may pose no bar to arbitrary, gratuitous awards. In the latter, where calculated falsehood plays no part, presumed and punitive damages are disallowed.

### B. Self-Censorship

In arguing that "media" and "non-media" speakers can be distinguished by reference to alleged differences in their respective fears of self-censorship, Greenmoss paints the "media" as a homogeneous, altruistic institution motivated by journalistic ideals alone. But surely Greenmoss is not so naive as to believe that national newspapers and networks are not profit-making enterprises very much concerned with giving their audiences what they want. Certainly those segments of the "media" have flourished no less than D&B. Since Greenmoss readily concedes that profit-making "media" entities legitimately fear self-censorship, the contention that D&B's success somehow insulates D&B from chilling effects is untenable.

Greenmoss contradicts itself when it speculates that "non-media" speakers censor themselves less often than the "media." On one hand, Greenmoss postulates that "non-media" defendants will probably not consider defamation laws before they speak. On the other, Greenmoss insists that these same defendants con-

sciously weigh the legal risks involved in publishing "risky information" and become "emboldened" at the thought that a plaintiff will never pierce their gossamer armor of state privilege or at least will never prove causation.

It is preposterous to suggest that only the "media" would consider the threat of arbitrary, million-dollar verdicts before publishing "risky information." Greenmoss does not explain its unsupported conclusion that speakers like D&B could not "simply decide" to withhold such information because of the risks involved. That argument ignores reality.

To give just one example, D&B might well determine that the risk of publishing criminal history or business failure information about the undisclosed principal of a company is simply too great to justify inclusion of such information in its report. See R. Cole, *Consumer and Commercial Credit Management* 351-53 (7th ed. 1984). An individual who has had one or more fraud convictions or business failures leaving unpaid creditors may start a new company in the same line of business as his past ventures. He may shield his involvement in the new corporation by using his wife or children as the sole officers, directors and shareholders. Suppose D&B learns from individuals dealing with the company that the husband appears to be the person running the business and is on the premises regularly. D&B also learns that he is the sole signatory on the corporation's checking account. When asked, however, the corporation (for obvious reasons) denies that he is involved. Like a newspaper reporting on the same facts, D&B would be "chilled" from saying that the husband was a principal in the business and relating his prior convictions or business failures in its re-

port on the company for fear of presumed and punitive damages. Like the newspaper, D&B would no doubt continue to exist, since its reports would still include a variety of information of interest to its subscribers. But that hardly demonstrates a lesser chilling effect.

Although Greenmoss rightly determined not to press the point, Sunward insists that D&B somehow had the burden of proving chilling effect at trial. No court has ever required that to be done as a condition of First Amendment safeguards. If Sunward wants empirical evidence, the verdicts in *Greenmoss* and *Sunward* should be enough. The prospect of such verdicts was all *The New York Times* had to show in *New York Times v. Sullivan*. For further evidence, the Court need only consider the ABA study cited in Greenmoss' supplemental brief: "non-media" defendants face suits more often, stand trial more often, lose more often, and suffer substantial verdicts more often than the "media." Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 Am. B. Found. Research J. 455, 457, 467, 471, 473, 497.

### III.

#### COMMERCIAL SPEECH

Greenmoss devotes a large portion of its brief to the proposition that the commercial speech doctrine embraces more than advertising and related promotional activity. It resorts to every strained comparison it can conjure in an attempt to broaden commercial speech to embrace financial reports.<sup>11</sup> What Greenmoss wholly

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<sup>11</sup> For example, Greenmoss' supposed "common ground" of advertising and credit reports as "conveying information" (Supple-

fails to explain, however, is why the contours of commercial speech have any bearing on the resolution of this case.

Contrary to Greenmoss' contention, a holding that the speech at issue here is "commercial speech" is not necessary to preserve a state's power to regulate it.<sup>12</sup> Nor would such a holding empower a state to punish or ban the speech at issue without regard to the interest advanced. Greenmoss' arguments about the "level" of First Amendment protection afforded credit reports cannot change the fact that there exists no legitimate state interest in allowing private plaintiffs to recover presumed and punitive damages for defamation absent calculated falsehood. *Gertz*'s damage limitations apply whether commercial speech is involved or not.

Greenmoss contends that the heretofore limited category of commercial speech should now include all "fact-based information about business" published with "a particular profit motive." (Supplemental Brief of Respondent at 42) That definition, of course, covers virtually everything published by *The Wall Street Journal*, *Forbes*, and *Fortune*, to name a few. Constitutional issues of liability and damages would turn upon judges' (or juries') assessments of whether particular stories should be viewed as "about business" or something more. Despite what Greenmoss says, black and white distinctions would be elusive.

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mental Brief of Respondent at 43) embraces virtually all speech, "commercial" or otherwise.

<sup>12</sup> To take only one example, state regulation of fraudulent conduct does not depend upon a finding that it is "commercial speech."

Recognizing the shortcomings of this approach, Greenmoss and Sunward invite the Court to make a *sui generis* rule for D&B's reports. Those reports, they say, are both hardy and easily verifiable. But D&B is no more hardy than a successful newspaper. And the statement "Greenmoss is bankrupt" is no more verifiable when published by D&B than when published by *The Burlington Free Press*.

## CONCLUSION

For all the reasons expressed in this brief and the others filed by the Petitioner, the Court should reverse the judgment of the Vermont Supreme Court and order a new trial.

Respectfully submitted,

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